

***United States Court of Appeals
for the
District of Columbia Circuit***



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United States Court of Appeals
For the
District of Columbia Circuit

FILED

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Joseph W. Stewart

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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,456

SOUTHWESTERN PUBLISHING COMPANY,
SOUTHWESTERN RADIO AND TELEVISION COMPANY,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
AMERICAN TELEVISION COMPANY, INC.,
Intervenor.

APPEAL FROM FEDERAL COMMUNICATIONS COMMISSION

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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SOUTHWESTERN RADIO AND TELEVISION COMPANY,
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AMERICAN TELEVISION COMPANY, INC.,
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APPEAL FROM FEDERAL COMMUNICATIONS COMMISSION

JOINT APPENDIX

(1)

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JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

96

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of)
AMERICAN TELEVISION COMPANY, INC.)
(ASSIGNOR))

and)

SOUTHWESTERN PUBLISHING COMPANY)
(ASSIGNEE))

For Assignment of Construction)
Permit for Station KNAC-TV)
Fort Smith, Arkansas)

In re Application of)
AMERICAN TELEVISION COMPANY, INC.)

For Extension of Time to Complete)
Construction of Station KNAC-TV)
Fort Smith, Arkansas)

DOCKET NO. 11385
FILE NO. BAPCT-136

DOCKET NO. 11386
FILE NO. BMPCT-2757

ORDER

At a session of the Federal Communications Commission held
at its offices in Washington, D.C., on the 4th day of May, 1955;

The Commission having under consideration the above-entitled
applications to assign the construction permit for and extension of time
to complete construction of Station KNAC-TV, Channel 5, Fort Smith,
Arkansas; and

IT APPEARING, That the Commission on February 16, 1955, forwarded a notice to the applicants apprising them, pursuant to Section 309(b) of the Communications Act of 1934, as amended, of all objections to the above applications, particularly with respect to the amount of consideration to be received for the assignment of the construction permit; that the Commission was unable to determine that a grant of the said applications would be in the public interest; and that the applicants were afforded an opportunity to reply to the Commission's letter; and

IT FURTHER APPEARING, That upon due consideration of the above-entitled applications, the Commission's letter of February 16, 1955, and the applicants' reply thereto filed March 22, 1955, the Commission finds that the above-entitled applicants are legally, technically and financially qualified except as to the matters specified in Issues 1 and 2 below;

IT IS ORDERED, That, pursuant to Section 309(b) of the Communications Act of 1934, as amended, the above-entitled applications are designated for hearing at the offices of the Commission in Washington, D.C., at a time and date to be specified by the Chief Hearing Examiner, upon the following issues:

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1. To determine whether, in light of the consideration to be received by American Television Company, Inc., H. S. Nakdimen and George T. Hernreich from Southwestern Publishing Company for the assignment of the permit for Station K NAC-TV and the agreement of said individuals not to re-enter the broadcasting field, the above-entitled applications involve "trafficking" in a construction permit, contrary to the public interest.

2. To determine whether, on the basis of the evidence adduced with respect to Issue 1 above, a grant of the above-entitled applications would serve the public interest, convenience and necessity.

**FEDERAL COMMUNICATIONS
COMMISSION**

/s/ Mary Jane Morris
Secretary

Released: May 6, 1955

Findings of FactPreliminary Statement

1. In this proceeding, American Television Company, Inc., hereinafter sometimes referred to as American or the assignor, seeks Commission consent to the assignment of a permit to construct Television Station KNAC-TV, Channel 5, Fort Smith, Arkansas, to the Southwestern Publishing Company, hereinafter sometimes referred to as Southwestern or the assignee, Fort Smith, Arkansas. The application for the assignment of construction permit was filed December 20, 1954. One day later, American Television Company, Inc. filed an application requesting an extension of time to complete the construction of Station KNAC-TV, Channel 5, Fort Smith, Arkansas.

2. On January 17, 1955, the Commission received a petition from Tulsa Broadcasting Company, licensee of Standard Broadcast Station KFPW, Fort Smith, Arkansas, requesting the Commission to designate for hearing the application for assignment of construction permit of Station KNAC-TV.

3. The applications were designated for hearing by an order of the Commission adopted May 4, 1955. The two issues specified in that order were as follows:

"1. To determine whether, in light of the consideration to be received by American Television Company, Inc., H. S. Nakdimen and George T. Hernreich from Southwestern Publishing Company for the assignment of the permit for Station KNAC-TV and the agreement of said individuals not to re-enter the broadcasting field, the above-entitled applications involve 'trafficking' in a construction permit, contrary to the public interest.

"2. To determine whether, on the basis of the evidence adduced with respect to Issue 1 above, a grant of the above-entitled applications would serve the public interest, convenience and necessity."

4. A pre-hearing conference pursuant to the provisions of Section 1.813 of the Commission's Rules was held June 17, 1955. Hearings were held on June 30 and July 19, 1955. Proposed findings of fact and conclusions of law on behalf of the applicants were filed on August 30, 1955, and on behalf of the Chief of the Broadcast Bureau on August 31, 1955.

Background of the Instant Applications

5. By the Commission's Sixth Report and Order, VHF Channel 5 and UHF Channel 22 were allocated to television stations serving the Fort Smith, Arkansas, area. On February 6, 1952, American Television Company, Inc. filed an application for a permit to construct a television station at Fort Smith, Arkansas, to operate on Channel 5. This application was subsequently amended on July 14, 1952, December 28, 1953, and again on April 28, 1954. At the time the American Television Company, Inc. application was filed, H. S. Nakdimen was the president and sole beneficial stockholder of that corporation and has so remained for the present time.

162 6. On July 1, 1952, George T. Hernreich filed an application also seeking a permit to construct a television station to operate on Channel 5, Fort Smith, Arkansas. This application was subsequently amended on September 2, 1952, December 28, 1953, and again on January 24, 1954.

7. As American and Hernreich sought a construction permit for Channel 5 at Fort Smith, Arkansas, the two applications were mutually exclusive. By Commission order of February 3, 1954, the two applications were designated for hearing in a consolidated proceeding. Hearing conferences in the matter of American Television Company, Inc. (Docket 10893) and George T. Hernreich (Docket 10894) were held before a Hearing Examiner of the Commission on March 5, 1954. Exhibits in support of the respective applications were filed and the hearing began on April 21, 1954. On April 22, 1954, a motion for a recess to discuss the possible consolidation and merger of the applications was granted. At the further hearing on April 28, 1954, it was

announced to the Hearing Examiner that pursuant to an agreement which the parties entered into on April 24, 1954, Mr. George T. Hernreich had been given an option to purchase 50% of the stock of the American Television Company, Inc. and that Mr. Hernreich had filed with the Commission a petition requesting the dismissal of his application (Docket No. 10894). Mr. Hernreich's application was subsequently dismissed. The application of American Television Company, Inc. was amended to reflect the agreement referred to and on June 3, 1954, the Commission granted the application as amended and issued a permit authorizing the American Television Company, Inc. to construct Station KNAC-TV to operate on Channel 5 at Fort Smith, Arkansas.

8. Southwestern Publishing Company, the proposed assignee, is the parent corporation and sole stockholder of Southwestern Radio and Television Company, licensee of Stations KFSA-AM, FM and TV, Fort Smith, Arkansas. Television Station KFSA-TV went on the air on July 10, 1953, operating on UHF Channel 22. By December 1954, Station KFSA-TV had incurred serious losses. In the event this assignment application is granted, it is proposed to change the assignment of Station KFSA-TV from UHF Channel 22 to VHF Channel 5.

9. Shortly after American received its construction permit, the principals of Southwestern asked for a conference at which American Television Company, Inc. was advised that the operation of Station KFSA-TV on Channel 22 had not been profitable and it was likely that if the two stations operated at Fort Smith, one or both would suffer substantial losses. Subsequent to that conference, American made various inquiries concerning the amount of business it might be able to obtain from national advertisers on a spot basis and from local advertisers. The prospect for immediate financial success of the proposed television station did not appear as bright as at the time the applications for construction permits were filed.

162 A

The Contracts In Issue

10. The principals involved, namely, Mr. H. S. Nakdimen and Mr. George T. Hernreich, on the one hand, and the officials of

Southwestern Publishing Company, on the other, discussed the possibility of a consolidation or merger but it was decided that this was not feasible principally because it would have required one of the parties to divest itself of radio interests in Fort Smith. Further negotiations resulted in the agreement which is in issue in this proceeding.

11. The terms of the agreement are substantially as follows. Southwestern, the proposed assignee, will pay American the sum of \$50,000 upon the assignment to it with Commission consent of the construction permit for the Fort Smith, Arkansas, Channel 5 television station. In addition, Southwestern has entered into separate agreements with H. S. Nakdimen and George T. Hernreich under the terms of which Nakdimen and Hernreich agree that for a period of seven years after the assignment of the construction permit, neither will engage in television broadcasting at Fort Smith, Arkansas, or in any community within a radius of one hundred and fifty miles of Fort Smith. In addition, Hernreich, who up to now has not engaged in radio broadcasting, agreed not to enter that field. In return for these covenants not to compete, Southwestern agrees to pay Nakdimen and Hernreich the sum of \$5,000 each per year during the life of the covenants.

12. In the event this assignment application is not granted, the assignor will proceed with the construction and operation of Station KNAC-TV. Physical construction of the station is now being held in abeyance pending Commission action in this proceeding.

13. The basic facts are not disputed. In the course of prosecuting the application of American Television Company, Inc. (Docket 10893) which went into comparative hearing, Mr. Hernreich incurred and paid legal, engineering, travel and other "out-of-pocket" expenses totalling \$16,361.43. Mr. George T. Hernreich in prosecuting his application in Docket 10894 incurred various legal, engineering, travel and other "out-of-pocket" expenses totalling \$14,871.24. Thus, Messrs. Nakdimen and Hernreich made "out-of-pocket" expenditures to other persons totalling \$31,232.67. The difference between this "out-of-pocket" expenditure and the \$50,000 which Southwestern has agreed to pay for

the construction permit is \$18,767.33. Of this sum, part will be used to cover the cost of the dissolution of American Television Company, Inc. The remainder is to be divided between Messrs. Nakdimen and Hernreich. The "out-of-pocket" expenditures of both parties are itemized in detail. The reasonableness of the sums paid and the justification for such expenditures are conceded.

14. The basis for questioning the assignment contract and the forbearance agreements arises out of the fact that Nakdimen and Hernreich are to receive compensation for something other than physical properties and a going business.

163 15. In order to justify the reasonableness of the sums over and above the "out-of-pocket" reimbursements above referred to, Messrs. Nakdimen and Hernreich endeavored to give an estimate of the amount of time which each had spent on various phases of the preparation and prosecution of their original competitive applications.

16. Mr. Nakdimen's estimate of the amount of time devoted to the preparation and prosecution of his television application was as follows: (a) Securing transmitter site and information required by consulting engineers in connection with original application - 4-5 days; (b) amendment of application on July 15, 1952, including complete program schedule and change of transmitter site - 5 days; (c) amendments of application of December 28, 1953, and January 25, 1954, requiring negotiation of loan for \$200,000 - 3-4 days; (d) preparation of exchange of information with television consultant after hearing was designated - 5 days; (e) securing the planning proposed studios - 5-6 days; (f) preparation of points of reliance, including investigation of competing applicant - 15 days; (g) preparation of exhibits for hearing - 3 days; (h) soliciting local cooperation in connection with proposed programming and arranging for depositions - 5-6 days; (i) preparation of testimony for hearing and attendance at hearing - 4-5 days; and (j) trips to Washington to confer with legal counsel and engineers concerning preparation of application and exhibits - 20 days. Based on these estimates, Mr. Nakdimen spent from 59 to 64 days in preparing,

amending and prosecuting his application after it had been filed. These activities were spread over a period of more than two years.

17. Mr. Nakdimen, at the time of filing and prosecuting the American Channel 5 television application, was president, director and largest individual stockholder of the City National Bank at Fort Smith, Arkansas. He was also president, director and majority stockholder of the Oklahoma-Arkansas Telephone Company and secretary-treasurer and approximately one-third stockholder of the American Real Estate Insurance Company of Fort Smith. He also has other business interests. He was and is the principal stockholder of KWHN Broadcasting Company licensee of Standard Broadcast Station KWHN, Fort Smith, Arkansas. He devoted the greater portion of his time to conducting the affairs of the bank in which building Mr. Nakdimen had his offices. Concerning the amount of time devoted to the securing of the transmitter site, Mr. Nakdimen testified that an engineer visited Fort Smith, was there three or four days, and looked at several sites, one approximately thirty-two miles north of Fort Smith, one approximately nine miles west, as well as other sites. After deciding on the site, it was found that the farmer would not sell. Furthermore, the site had no electricity, water or sewage system. In the July 15, 1952, amendment, the transmitter site was changed and a specific studio location designated. Mr. Nakdimen was with the engineer most of the time he was there making the survey. As a result, he was away from his office and other business activities. A somewhat comparable explanation was given of the amount of time devoted to other activities.

163 A 18. Mr. Nakdimen agreed that he could not point to any financial loss incurred while attending to the television application but testified that the fair value of the compensation for the amount of time which he devoted to the television application was \$15,000 based upon the actual and testimated earnings during that period.

19. Mr. Hernreich's estimate of the amount of time devoted to the preparation and prosecution of his television application was as

follows: (a) Preparation of original application - 25 days; (b) selection of transmitter site and negotiating for acquisition of same - 10 days; (c) amendment of application of December 1953, including complete program schedule, change of transmitter site and designation of specific studio site - 4-5 days; (d) amendment of application of January 1954, and preparation of points of reliance - 6-7 days; (e) contacting of local organizations with respect to proposed programming - 10 days; (f) visits to television stations to learn technical aspects of operation - 20 days; (g) reading and discussions concerning television operation - 5-10 days; and (h) attendance at and preparation for hearing - 5 days. Thus, Mr. Hernreich estimates that he devoted 85 to 92 days to preparing and prosecuting his television application.

20. Mr. Hernreich has various business interests in and near Fort Smith, Arkansas, and at Camp Chaffee, a nearby Army installation. These several business establishments sell and repair watches, jewelry, radios, television sets and other items. He has no radio interests other than his equity in the assignor corporation. Mr. Hernreich stated that on the basis of his earnings during the six months which preceded the hearing as compared to his earnings during the time he was preparing and prosecuting his television application, the amount of time devoted to the television application was worth between \$15,000 and \$20,000.

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Conclusions

1. The issue to be resolved in this proceeding is whether the proposed payment to Messrs. H. S. Nakdimen and George T. Hernreich for the sum of approximately \$18,000 over and above the actual "out-of-pocket" expenditures of these gentlemen in prosecuting their applications for the construction permit which they seek to assign and the agreements of the said H. S. Nakdimen and George T. Hernreich not to re-enter the broadcasting field constitute "trafficking" in a construction permit contrary to the public interest.

2. There is no issue relating to the application of American Television Company, Inc. for the extension of time to complete the construction of Station KNAC-TV.

3. The phrases "trafficking in a construction permit" or "trafficking in licenses" as understood by the Hearing Examiner mean the acquisition of a construction permit or station license with the view of disposing the license to another or other either immediately or after holding the same for a "respectable" period of time. See Powel Crosley, Jr., Transferor, and The Aviation Corp., Transferee, Docket No. 6767 (the AVCO Case), August 2, 1945, 3 RR 6. In the AVCO Case, the Commission, after noting that the Communications Act of 1934, as amended, did not furnish any statutory standards to be employed in evaluating the factors justifying a specified sales price, stated that: (3 RR at page 26)

"Until Congress acts on this broader phase of the problem, the Commission's consideration of the price paid for a radio station must continue in the future, as it has in the past, to be limited to three questions:

"1. Is the price paid such as to indicate a trafficking in licenses? That is, is there evidence that the licensee acquired the station for the purpose of reselling it at a profit rather than for the purpose of rendering a public service?

"2. Is the price paid such that it adversely affects the licensee's financial qualifications?

"3. Is the price paid such that it would result in over-commercialization of the station at the expense of rendering a public service?"

164 A 4. There is no evidence in this proceeding upon which to predicate a finding that American Television Company, Inc. or H. S. Nakdimen or George T. Hernreich did not file and prosecute their applications in good faith. There is no evidence upon which to predicate a finding of fact or conclusion that at the time they agreed to consolidate their proposed applications and thus acquire a construction permit for the Channel 5 station which they did acquire, they did not then intend to construct and operate the proposed television station. The undisputed

evidence as of the close of the hearing is that in the event the Commission does not grant this assignment application, American Television Company, Inc. will proceed with the construction and operation of the Channel 5 station. On the basis of these facts, it is necessary to conclude that at the time the American Television Company, Inc. received a permit to construct the proposed Channel 5 station, Messrs. Nakdimen and Hernreich did intend to construct and operate the proposed station and did not acquire the construction permit for the purpose of reselling it at a profit.

5. In the course of prosecuting their respective applications which culminated in the issuance of the construction permit to the assignor corporation, Messrs. Nakdimen and Hernreich incurred and paid "out-of-pocket" expenditures in excess of \$31,000. They have devoted time to the preparation of the original applications, various amendments thereto, responses to Commission communications and contacted prospective witnesses and participants. During this period of more than two years, it was necessary for them to maintain their financial affairs in such a manner as to be able to meet the financial commitments as represented in the television applications and to be ready to proceed with the prosecution of their applications. At the time the applications were filed and when Messrs. Nakdimen and Hernreich were responding to Commission communications and preparing for the competitive hearing, the trade magazines, financial pages and many daily newspapers were discussing the fortunes made and to be made in television. By the time the construction permit was granted on June 4, 1954, it was apparent that every merchant was not seeking to advertise on every television station and that some of the stations were not as successful or profitable as some of the original owners had anticipated. The proposed assignee, Southwestern Publishing Company, the sole stockholder of the licensee of Station KFSA-TV, Channel 22, had learned from experience that all television stations do not make money all the time. While no witness for Southwestern appeared in this proceeding,

it is obvious that the assignee believes that Station KFSA-TV will have more viewers when operating on Channel 5 than it will have when operating on UHF Channel 22. There is nothing in the record to suggest that Southwestern seeks the construction permit for the purpose of selling it to another for profit.

165 6. Messrs. Nakdimen and Hernreich will receive compensation for something other than existing physical facilities and a going business activity. There are, however, several Commission precedents wherein the assignee or transferee has paid sums in excess of the fair value of the physical properties and "good will" in acquiring a broadcast station or construction permit. See In re applications of Gene Howe et al., Dockets 9377 et al., October 3, 1949, 5 RR 804; In re applications of Versluis Radio and Television, Inc., et al., Dockets 10442 et al., July 1, 1954, 9 RR 1123 and in particular paragraph 3 of the conclusions; and In re applications for Cherry & Webb Broadcasting Company, Docket 8737, January 5, 1955, 11 RR 859 and in particular paragraphs 18 and 19 of the conclusions. In addition, there have been many assignment or transfer applications granted without a hearing in which the amount paid by the assignee or transferee exceeded the fair value of the physical properties. Among those cited in the pleadings in this proceeding are the applications for transfer of control of the licensees of WXEL-TV, Cleveland, Ohio and KPTV, Portland, Oregon (BPCT-1672 granted October 27, 1954); the application for the assignment of the construction permit for Station WTVW, Milwaukee, Wisconsin (BAPCT-140 granted March 2, 1955); the transfer of control of Station KFSD-TV, San Diego, California (BTC-1816 granted October 13, 1954); and the assignment of the construction permit for Station KVOL-TV, Lafayette, Louisiana (BAPCT-133 granted January 1, 1955). These precedents show that the Commission is still applying the statutory standard of public interest, convenience and necessity as interpreted in the AVCO case.

7. The financial ability of Southwestern to pay the amount called for in the contract or to construct the station or to change from Channel 22 to Channel 5 has not been challenged and is not in issue in this

proceeding. There is no evidence upon which to conclude that the obligations to be incurred by Southwestern under the assignment and forbearance contracts will adversely affect the assignee's financial qualifications. It is reasonable to believe that the consummation of the proposals herein involved and the subsequent operation by the assignee of Station KFSA-TV on Channel 5 rather than on Channel 22 will result in the improvement of the assignee's financial condition.

8. There is likewise no evidence of record upon which to predicate a finding that the price to be paid by the assignee is such that it will result in the over-commercialization of the station at the expense of rendering a public service. On the contrary, it is reasonable to believe that the transfer of the operating assignment of Station KFSA-TV from UHF Channel 22 to VHF Channel 5 will result in an improvement in the assignee's financial qualifications and enable the assignee, through its subsidiary, to render service at least as good if not better than that rendered while operating on Channel 22 and losing money.

165-A 9. The Hearing Examiner concludes that the contract for the proposed assignment of the construction permit for Station KNAC-TV, Channel 5, Fort Smith, Arkansas, from American Television Company, Inc., assignor, to Southwestern Publishing Company, assignee, and the contract of H.S. Nakdimen and George T. Hernreich not to re-enter the broadcast field do not, in the light of the considerations to be paid or received, constitute "trafficking" in a construction permit contrary to the public interest.

10. It is the conclusion of the Hearing Examiner, that on the basis of the evidence with respect to the issues in this proceeding, the grant of the application to assign the construction permit for Station KNAC-TV and of the application for extension of time to complete the construction of Station KNAC-TV will serve the public interest, convenience and necessity.

IT IS ORDERED this the 29th day of September 1955, that unless an appeal to the Commission from this Initial Decision is taken by any of the parties or the Commission reviews the Initial Decision on its own

motion in accordance with the provisions of Section 1.853 of the Rules, the application of American Television Company, Inc. to assign the construction permit for Station KNAC-TV, Fort Smith, Arkansas, to Southwestern Publishing Company, Docket No. 11385, File No. BAPCT-136, and the application of American Television Company, Inc. for extension of time to complete the construction of Station KNAC-TV, Fort Smith, Arkansas, Docket No. 11386, File No. BMPCT-2757, BE and the same ARE HEREBY GRANTED.

/s/ Basil P. Cooper
 Basil P. Cooper
 Hearing Examiner
 Federal Communications
 Commission

Released: October 3, 1955
 and effective 40 days thereafter,
 subject to the provisions of the Rule
 cited in the ordering clause above.

287 [Apr 10, 1956, FCC]

**PETITION TO SET ASIDE INITIAL DECISION AND REOPEN
 RECORD FOR THE TAKING OF FURTHER EVIDENCE**

Southwestern Publishing Company desires to apprise the Commission of certain changed circumstances in the above-entitled cases and to request that in light of such changed circumstances the initial decision in this proceeding be vacated and the record be reopened and brought up to date.

288 These proceedings involve an application for extension of construction permit for Television Station KNAC-TV at Fort Smith, Arkansas and an application for consent to assignment of the construction permit to Southwestern Publishing Company. The record has been closed, an initial decision looking toward granting of both applications has been rendered, and an oral argument has been held by the Commission on

its own motion to consider whether the record should be reopened in light of certain allegations made to the Commission by persons not parties to this proceeding.

The oral argument above referred to was held on March 20, 1956. Subsequent to that oral argument, the contract of assignment between American Television Company, Inc. and Southwestern Publishing Company has lapsed by its own terms. Southwestern Publishing Company thus far has been unable, despite assiduous efforts, to obtain a further extension of the contract. Unless the contract should be voluntarily revived, or held enforceable by judicial action,* the application for consent to assignment will become moot.

289 The Commission is now confronted with the question as to whether an extension of the construction permit for station KNAC-TV would serve the public interest in light of the changed circumstances. Factors which were totally inconsequential so long as the assignment of construction permit to Southwestern was immediately contemplated have now become critical. Thus when the original construction permit was granted it was contemplated that Hiram Nakdimen, an experienced broadcaster, would act as General Manager of the station for the first five years, and the financing of the station depended in large part upon Mr. Nakdimen's resources.** During the pendency of the present hearing Mr. Nakdimen died, thus removing the only experienced broadcaster connected with the applicant.

The Commission does not now have before it sufficient facts with respect to the intentions and capabilities of the Nakdimen estate to proceed with the construction and operation of the station. The Commission does not have any facts before it as to the value of the estate or the extent to which it will be necessary to borrow money to finance the proposed

* Southwestern has under consideration the pursuit of judicial remedies which, if successful, would result in relief in the nature of specific performance of the contract.

** See agreement of April 24, 1954 filed with an amendment to BPCT-842.

290 construction, or the ability of the estate to borrow money, assuming that the estate has the legal power and the desire to do so.

A copy of Mr. Nakdimen's will is attached to this petition as Exhibit A. Under the terms of the will the bulk of the estate, including all of Mr. Nakdimen's stock in American Television Company, Inc., is placed in trust for a long term of years. Neither the trustees nor the beneficiaries are obligated to perform the decedent's obligations to furnish additional construction and operating capital to the Company, as was Mr. Nakdimen under the contract with the Company dated April 24, 1954. There is no express power which would permit the executors or trustees to borrow money for the financing of construction of a television station. Since specific powers are conferred under the will to borrow money for certain purposes, the obvious implication is that the executors or trustees are not authorized to borrow money for purposes not specified. Restatement of law of Trusts, Section 191; Honnet v. Williams, 66 Ark. 148, 49 S.W. 495; Williamson v. Grider, 97 Ark. 588, 135 S.W. 361; Heisman v. Lowenstein, 113 Ark. 404, 169 S.W. 224. An additional element of uncertainty is introduced by reason of the fact that it cannot

291 now be known who will actually serve as trustees of the trusts created under Mr. Nakdimen's will. We are advised that the executors named in the will (who are also named as trustees) have all been removed by Court Order or have resigned. It seems at least unlikely that they will serve as trustees.

Uncertainty with respect to the ownership of American Television Company, Inc. is also created by the fact that while the permittee was owned by Mr. Nakdimen, Mr. George Hernreich has held an option for a 50% interest in the company since the original grant of construction permit. Mr. Hernreich has advised the Commission that he intends to exercise his option and that he may buy out the estate and build the station.* But he has not offered any evidence of his financial ability to do

* See Petition filed by George T. Hernreich herein on February 25, 1956.

so. Nor has he made any showing that the estate is willing to sell out to him. On the contrary, the estate has advised the Commission that it had no intention of selling out its interest to Mr. Hernreich.* Thus in the present state of the record the Commission does not really know who will ultimately construct and operate the station or whether the persons who will do so are financially, technically or otherwise qualified.

291A Before deciding whether the public interest will be served by an extension of the construction permit, the Commission should determine the present qualifications of the persons who will actually own and operate the station. Today, as we understand it, control of the station insofar as the Commission's records is concerned is in no one's hands. The Commission has been advised of the death of Mr. Nakdimen, but no application for transfer of control has been filed or granted. Before any extension of construction permit is granted the Commission should have all the facts before it which are necessary to intelligent decision as to whether the public interest would be better served by extending this permit, or by throwing the channel open to all qualified applicants.

So long as the assignment application was pending, the Commission was forbidden by the letter and spirit of Section 310 of the Communications Act from considering the qualifications of possible applicants for the channel other than the proposed assignee. Now that the assignment, as proposed, apparently cannot immediately be accomplished, the Commission has before it only the question of whether it should exercise its discretion in favor of extending a construction permit where the makeup of the permit-

292 tee has radically changed, or whether it should deny such extension and receive applications for channel 5 from all qualified persons who desire to apply at this time. If the Commission should follow the latter course, Southwestern would promptly file an application for channel 5.

In light of the foregoing, it is submitted that the initial decision

* See letter of February 25, 1956 to the Commission from Salome Nakdimen and others.

should be vacated and the case remanded to the examiner to permit the record to be brought up to date and to make such additional findings and conclusions as may be appropriate and necessary. Any applications for involuntary or voluntary transfer of control of the permittee should be consolidated for hearing herein so that all public interest questions can be resolved in a single proceeding.

Southwestern proposes to participate in any such further hearing to assist in eliciting full information so that the Commission can make an informed decision in the public interest.

Respectfully submitted,

SOUTHWESTERN PUBLISHING COMPANY

By /s/ Andrew G. Haley

/s/ J. Roger Wollenberg

Haley, Doty and Wollenberg
1735 DeSales Street, N.W.
Washington, D.C.

April 10, 1956.

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(CERTIFICATE OF SERVICE)

- - -

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EXHIBIT A

KNOW ALL MEN BY THESE PRESENTS:

That I, H.S. Nakdimen, a resident of Fort Smith, Sebastian County, Arkansas, being of legal age and sound mind, do hereby make and declare this instrument as and for my last will and testament, hereby revoking any and all wills heretofore made by me.

I. I direct that all my just debts be paid.

II. I give, devise and bequeath to my wife, Salome Nakdimen, our home on Euper Lane in Fort Smith, Arkansas, the household furnishings therein, my personal jewelry and automobiles which I may own at the time of my death.

III. I give, devise and bequeath to Meyer Nakdimen of Pennington Gap, Virginia, if he survives me, the sum of \$5000.00 cash. This bequest

may be paid by my executors in a lump sum or by installments at any time during the administration of my estate, after payment of inheritance taxes, that the Probate Court may approve, but payment of this bequest shall not be permitted to denude my estate of cash which may be needed by my wife and family for their immediate support, and payment may be deferred, in whole or in part, and assumed by my trustees, hereinafter named, if cash is not available in the course of administration of my estate.

IV. I give, devise and bequeath all the rest, remainder and residue of my estate, real, personal or mixed, which I now or may hereafter own, or of which I may have the power to dispose at the time of my death, and wheresoever situated, to J.H. Friedman of Fort Smith, Arkansas, M. Bershof of Denver, Colorado, and Alfred Aaronson of Tulsa, Oklahoma, in trust, however, for the following uses and purposes:

(a) An undivided one-half interest in my residual estate shall be held in trust for my wife, Salome Nakdimen.

(b) An undivided one-half interest in my residual estate shall be held in trust for the child of myself and Salome Nakdimen.

295 (c) My trustees shall take charge of the assets of said trusts, preserve, protect and manage current investments; invest and re-invest funds coming into their possession; buy, sell, improve, mortgage and lease real, personal and mixed property for the account of the trusts, including specifically the power to enter into leases for a term which extends beyond the expected termination of these trusts, and the beneficiaries of these trusts shall be bound by such prior agreement entered into by my trustees at such time as the interests described herein may vest free of trust. If any building owned by the trust estates should be destroyed or materially damaged, my trustees may, in their best business discretion, elect to rebuild or repair the same, using such insurance proceeds and/or other funds as may be available, (including funds borrowed for such purpose), or may sell the land and salvage, and invest the funds in other investments.

(d) In managing the trust estates, it is my will that my trustees

shall not be limited as to the kind or nature of the investments which may be prescribed by law for trust funds, but shall have the privilege of using their own best business judgment in selecting investments, and they are authorized to handle the affairs of these trusts in the same manner and with the same discretion as they would handle their own investments.

However, it is my strong preference that my interest in real estate, particularly Garrison Avenue property, be held intact, during the existence of these trusts, unless my trustees are unanimously of the opinion that it is essential in the best interest of the beneficiaries that it be sold.

It is also my desire and preference that the property which is now held as the "I. H. Nakdimen Estate Account", be handled by my trustees in the same manner that it has by me, other interested parties consenting.

(e) My trustees may delegate the administrative duties of these trusts to one of their number, who may be authorized to sign checks, collect rents, authorize ordinary maintenance of real property, and handle the general routine business of the estates. My trustees are authorized to employ such professional assistance in the administration of these trust estates as they find necessary and desirable. My trustees shall not be held responsible for any loss or damage to the estates or its investments, unless the same shall result from gross negligence or malfeasance.

(f) My trustees shall pay taxes, insurance and maintenance upon the properties constituting the trust estates, and in addition shall accumulate an amount as a reserve for capital replacements which in their business judgment is necessary and proper, but not exceeding the amount which would constitute a normal reserve for depreciation. These and similar expenses incurred in connection with managing the properties constituting the trust estates shall be charged against the respective trusts in equal amounts. Any expense incurred solely for the benefit of one of the trusts shall be charged against the particular trust benefited.

(g) The net income from the property held in trust for the benefit of my wife shall be payable at least annually, and my trustees

shall from time to time disburse such amounts of the net income of this trust as my wife may in her discretion require. In the event my wife does not withdraw the entire amount of the net income, my trustees shall care for the balance remaining in their hands, holding the same in liquid form, that is, so that it would be available to my wife on not more than ninety (90) days demand; provided, that in the event my wife so requests, my trustees may invest on her behalf accumulated income, if any, in the same manner and with the same discretion as provided for the corpus of this trust. The corpus of this trust (excluding any investments that may be made at the request of my wife from accumulated income) shall not be invaded unless the income therefrom should, in the judgment of my trustees, become inadequate to meet the essential needs of my wife. The continuation or termination of this trust shall be determined by the provisions hereinafter set forth for a similar trust in favor
297 of my child, and shall terminate to the same extent and at the times hereinafter provided for the trust for the benefit of my child. At such time as this trust, or any part thereof, is terminated, my trustees shall render an accounting for the principal and accumulated income, if any, of this trust, and title to the corpus, or any part thereof, shall vest absolutely in my wife, her heirs, legal representatives or assigns, free of this trust.

(h) From the net income from the property held in trust for the benefit of my child, my trustees shall pay to the caretaker of the Jewish cemetery a weekly amount, in their discretion appropriate, for the care of the graves of myself and my family. Unless and until some other legal guardian of the estate of my child shall be appointed, my trustees shall, from the remaining net income, pay to my wife, Salome Nakdimen, as natural guardian of my child, such amount as she may request for the support, care, maintenance, education and pleasure of my child. Notwithstanding my complete confidence in my wife and her judgment, my trustees are empowered, if they should ever entertain reasonable doubts as to the application of funds paid from this trust and deem it necessary, to require an accounting from my wife as to the application of such funds,

it being understood, however, that a fair and reasonable share of joint living expenses are properly payable from the net income of my child. The trustees may invest and re-invest such income, if any, as may accumulate in excess of the needs of my child, in the same manner and upon the same conditions as apply to the corpus. The corpus of this trust, including such accumulated income, if any, which has been invested, shall not be invaded unless the net income therefrom should, in the judgment of my trustees, become inadequate to meet the essential needs of my child.

(i) The trusts herein created shall continue as to the personal property in the estates until my child reaches the age of nineteen (19) 298 years (unless sooner terminated) at which time my trustees shall distribute to the beneficiaries the personal property in the respective trusts, except such funds as may be held as reserve in connection with the management of the real estate.

(j) The trusts herein created shall continue as to the real property in the estates until my child reaches the age of twenty-one (21) years (unless sooner terminated) at which time my trustees shall render a final accounting to the beneficiaries and be discharged from any further services to my estate.

(k) In the event my child should predecease me, or should die prior to the final termination of his trust, any undistributed portion of the trust estate devised or bequeathed to my child shall vest immediately, free of trust, in his or her surviving heirs at law (except a spouse) per stirpes. In the event my child leaves no descendants, the share of my child shall immediately vest absolutely in my wife, Salome Nakdimen, if she be living, freed of any trust, and if she should have predeceased my child, then the trust shall terminate forthwith, and this portion of my estate shall be distributed in accordance with the laws of descent and distribution.

(l) In the event my wife should die prior to the termination of the child's trust, her trust shall continue until the times specified in Paragraphs IV(i) & (j), unless sooner terminated as provided in

Paragraph IV(k), and the net income from my wife's trust shall be paid to her heirs at law, or in accordance with the provisions of any will she may leave, as her absolute property, and upon termination of the child's trust, the corpus shall be distributed in like manner as the income.

(m) In the event any one or more of my trustees shall predecease me, or surviving, should for any reason be unwilling or unavailable to serve, or should at any time thereafter become unavailable during the continuation of this trust, then the remaining qualified trustee or trustees shall be authorized to perform the duties of the trust.

299 V. My executors, hereinafter named, shall have the power and authority to encumber such of my real and/or personal property as in their discretion they find necessary to pay estate or inheritance taxes due on my estate, it being my preference and direction that my assets be encumbered rather than liquidated, if the cash in my estate is not adequate to meet the tax requirements. The taxes due on my estate shall be charged equally against the respective shares of my estate devised and bequeathed to my wife and child.

VI. The provisions made herein for my wife are to be in lieu of any right of dower, homestead, statutory allowance and the provisions of a pre-nuptial agreement made and entered into between myself and my wife, dated March 23, 1953.

VII. In the event my wife and I should perish in the same catastrophe, or under such circumstances as make it doubtful as to which predeceased the other, it is my will that my estate be distributed as if my wife had survived me.

VIII. I hereby constitute and appoint J. H. Friedman, M. Bershof and Alfred Aaronson as executors of my will, and should any one or more of them predecease me, those remaining shall serve.

IX. I request that my executors and trustees employ W. R. Carlisle to handle all accounting and tax matters pertaining to the administration of my estate and of the trusts herein created, and employ Edgar E. Bethell to handle all legal matters pertaining to the probate and

administration of my estate and the trusts herein created.

IN WITNESS WHEREOF I hereunto set my hand this 10th day of August, 1954.

s/ H.S. Nakdimen
H.S. Nakdimen

Signed, published and declared as and for his last will and testament by H.S. Nakdimen in our presence, and we, in his presence, and in the presence of each other, have hereunto set our hands as attesting witnesses this 10th day of August, 1954.

s/ Alex Constantino

s/ Glenn A. O'Neal

s/ Edgar E. Bethell

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CLERK'S CERTIFICATE

STATE OF ARKANSAS

COUNTY OF SEBASTIAN

I, WYATT WILKERSON, County and Probate Clerk for the State and County aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 27th day of December, 1955, and the same was admitted to probate and record on the 4th day of January, 1956.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal this 4th day of January, 1956.

WYATT WILKERSON, County and Probate
Clerk

By s/ Shirley Speaker D. C.

(SEAL)

302 [April 10, 1956, FCC]

**PETITION FOR DISMISSAL OF ASSIGNMENT APPLICATION
AND GRANT OF EXTENSION APPLICATION**

American Television Company, Inc., (hereinafter referred to as American) by its attorneys, respectfully requests that the Commission dismiss the above-entitled application for assignment as moot, and immediately grant the above-entitled application for extension of time to complete construction of station KNAC-TV, Fort Smith, Arkansas. In support whereof, Petitioner shows as follows:

1. On December 6, 1954, American and George T. Hernreich entered into a contract with Southwestern Publishing Company for the assignment of station KNAC-TV, Fort Smith, Arkansas to Southwestern which expired on April 1, 1956. The contract has not been and will not be extended further by either American Television Company or George T. Hernreich.

2. In view of the fact that the contract for assignment has expired, the proceedings now pending before the Commission on the above-entitled application for assignment have been rendered moot. Accordingly, it is requested that the Commission dismiss the said application for assignment.

303 3. The above-entitled application for extension of time to complete construction of KNAC-TV is the first request therefor. Action on the said application has been held in abeyance by the Commission only because of the pendency of the application for assignment, which has since been rendered moot. The questions raised by the Commission in its "McFarland" letter with respect to the extension of construction permit were satisfactorily answered by the permittee and no issue of any kind with respect thereto were designated by the Commission; in fact, the Examiner's Initial Decision herein states that "there is no issue relating to the application of American Television Company, Inc. for the extension of time to complete the construction of station KNAC-TV."

4. Upon the issuance of the Commission's Decision and Order granting the extension of construction permit herein, American will

proceed (as it has previously represented to the Commission) to construct the said television station.

Respectfully submitted,
AMERICAN TELEVISION COMPANY, INC.

By **Marcus Cohn**
Cohn & Marks
317 Cafritz Bldg.
Washington 6, D. C.

April 10, 1956.

304

(CERTIFICATE OF SERVICE)

310

[April 27, 1956, FCC]

**OPPOSITION TO "PETITION TO SET ASIDE INITIAL
 DECISION AND REOPEN RECORD FOR THE TAKING
 OF FURTHER EVIDENCE"**

American Television Company, Inc. (hereinafter referred to as "American"), herewith submits its opposition to the Petition of Southwestern Publishing Company (hereinafter referred to as Southwestern) of April 10, 1956, requesting that the favorable Initial Decision in this proceeding be vacated and the record be reopened.

1. Southwestern's Petition is completely predicated upon an alleged change of circumstance, resulting from the death of Mr. Hiram S. Nakdimen, sole beneficial owner of the issued stock in American Television Company, Inc., which Southwestern contends justifies the Commission to "exercise its discretion" to reopen these proceedings in order to determine whether the construction permit for KNAC-TV should be extended. No argument or contention is made by the Petitioner that the Commission is required to do so by its Rules, policies or the Communications Act.

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2. It will be readily apparent from a brief review of the facts involved herein that the basis relied upon by Southwestern for the relief requested by it is completely without merit. At the very outset, however,

it should be noted that such facts which Southwestern claims constitute a change of circumstance were not only known to Southwestern itself for many months prior to the filing of its instant petition but were also matters of public Commission record. Not only were the facts upon which Southwestern now relies upon known to it for months, but, when it was the proposed assignee of the very construction permit involved herein (BPCT-136), it affirmatively argued that these so-called "changed circumstances" should not and could not constitute a bar to the extension of the permit and its assignment to it. It is equally clear that the sole purpose of Southwestern's petition, as it explicitly concedes, is to now defeat an extension of the permit so that it may apply for and obtain the facilities involved herein.

3. The primary basis relied upon by Southwestern is that the death of Mr. Nakdimen has injected such a note of "uncertainty" as to require a determination by the Commission with respect to the qualifications of the persons which will actually own and operate station KNAC-TV. The question as stated by Southwestern is as follows: ". . . the Commission has before it only the question of whether it should exercise its discretion in favor of extending a construction permit where the make-up of the permittee has radically changed, or whether it should deny such extension and receive applications for Channel 5 from all qualified persons who desire to apply at this time." (Petition of Southwestern, pp. 6-7) It is well established, however, and the Commission has consistently and without exception held, that upon the death of a licensee or permittee or the beneficial owner of the stock in a licensee or permittee corporation that the Commission would grant its approval to the necessary involuntary transfer which resulted from such circumstances. Indeed, the matter is of such a routine nature that the Commission has
 312 delegated to its staff the authority to grant such applications. (Section 0.241 (d) (6) of the Commission's Rules). As a matter of fact, on March 13, 1956, the Commission granted the involuntary transfer of control of KWHN Broadcasting Company (licensee of Radio Station KWHN) to the Estate of H.S. Nakdimen (the same Estate that is

involved in the instant matter) in an action taken by the Broadcast Bureau, pursuant to its delegated authority (F. C. C. Report No. 2830, March 20, 1956).

4. The Petition contains innumerable misstatements of facts, wild conjectures and sly innuendoes that have no substance and fact. Each of these will be taken up separately:

(a) Petitioner states that "we are advised that the executors named in the Will (who are also named as trustees) have all been removed by Court Order or have resigned". This is a false statement and Petitioner could have ascertained the facts by examining the Court records. There is attached to the application for the involuntary transfer of control of KNAC-TV (BTC-2211), which was filed on April 10, 1956 a certified copy of the Court's Order designating Salome Nakdimen as sole Executrix of the Estate. (She and two other Executors were the original appointees and the Court subsequently removed the two others).

(b) The Petition states that "an additional element of uncertainty is introduced by reason of the fact that it cannot now be known who will serve as trustees of the trusts created under Mr. Nakdimen's Will". Petitioner offers no evidence, argument or citation to support this cavalier statement. An examination of the trust instrument and the Court records would clearly demonstrate who these people are.

(c) Petitioner states that ". . . the financing of the (television) station depended in large part upon Mr. Nakdimen's resources" and cites as authority for this statement the agreement between Nakdimen and Hernreich in BPCT-842. That agreement shows, on its face, that
313 the responsibility for the financing of the station was to be divided equally between Nakdimen and Hernreich.

(d) Petitioner states that the Commission "does not now have before it sufficient facts with respect to the intentions and capabilities of the Nakdimen Estate to proceed with the construction and operation of the station". Petitioner knows that the Estate advised the Commission on several different occasions, under oath, that it intended to proceed with the construction of the station in the same manner as had always been

contemplated. (In this connection see the letter from the Estate to the Commission of February 25, 1956).

(e) Petitioner makes the unique argument that the Estate does not have the obligation to perform Nakdimen's obligations under his agreement with Hernreich and American Television Company of April 24, 1954. That agreement is obviously binding on the Estate since the Estate acquired the Nakdimen shares of stock in American Television Company.

(f) Petitioner argues that the executors, under the Will of Mr. Nakdimen, cannot use funds of the Estate to proceed with construction-- in spite of the fact that Section IV (d) of the Will provides that the trustees "shall not be limited as to the kind or nature of the investments which may be prescribed by law for trust funds, but shall have the privilege of using their own best judgment in selecting investments . . . "

(g) Petitioner points out that Mr. Hernreich has advised the Commission that "he may buy out the Estate and build the station" and, based upon this, argues that there is uncertainty as to "who will ultimately construct and operate the station". The fact remains that the Estate advised the Commission under oath on February 25, 1956 that the Estate has no intention of selling its interest to Mr. Hernreich. There is no "uncertainty" except for that which exists in Petitioner's mind.

314 (h) Without any proof, Petitioner states that "today, as we understand it, control of the station insofar as the Commission's records are concerned, is in no one's hands." The issue before the Commission is not what Petitioner's understanding of the facts are. The only pertinent criterion is what the facts really are. ^{1/} The Commission's records are quite clear as to whose hands the construction permit is in.

5. On April 10, 1956 American Television Company filed an application for the involuntary transfer of control of KNAC-TV (File No. BTC-2211). The time for the filing of this application was postponed,

1/ Under Petitioner's theory the more ignorant Petitioner might be of what the facts are, the more persuasive would be his argument.

following the death of Mr. Nakdimen, on the advice of the permittee's counsel, who discussed the matter with the Broadcast Bureau and was advised that such an application need not be filed in view of the then pendency of the application for assignment of the construction permit to Petitioner. However, on April 10, 1956, following the expiration of the contract for assignment and the decision by American and Mr. HERNREICH, parties to the assignment contract, that it would not be extended, such an application for involuntary transfer of control was filed with the Commission and is presently pending for action.

6. As was pointed out in the Petition to dismiss the application to assign the construction permit to Petitioner, filed by American Television Company on April 10, 1956, there are no questions pending with respect to the above-entitled application for extension of construction permit, such questions having been satisfactorily answered by American in reply to the McFarland letter and no further questions with respect thereto have been raised by the Commission or any other party. Further, as was stated in the said petition, American will proceed, as
315 it had previously represented to the Commission, to construct the said television station.

WHEREFOR it is respectfully requested that the Commission deny the petition filed by Southwestern Publishing Company and that the Commission grant the petition filed by American Television Company.

Respectfully submitted,

AMERICAN TELEVISION COMPANY, INC.

By /s/ Marcus Cohn

Cohn & Marks
317 Cafritz Bldg.
Washington 6, D. C.

Its Attorney

April 27, 1956

(CERTIFICATE OF SERVICE)

316 [April 27, 1956, FCC]

**OPPOSITION TO PETITION TO SET ASIDE INITIAL DECISION
AND REOPEN RECORD FOR THE TAKING OF FURTHER
EVIDENCE**

1. On April 10, 1956, Southwestern Publishing Company (Assignee) filed a petition to set aside the Initial Decision in the above-captioned proceeding and to reopen the record for the receipt of further evidence.

2. In order that this matter may be placed in proper perspective a brief history of this proceeding is necessary. By Commission action of May 4, 1955, set forth in Order released May 6, 1955, the above-entitled applications were designated for hearing to determine whether the consideration to be received by American Television Company, Inc. (Assignor), H.S. Nakdimen and George T. Hernreich from Assignee for the assignment of the permit for Station KNAC-TV and the agreement of said individuals not to re-enter the broadcasting field amounted to "trafficking" in a construction permit. Pursuant to the hearing held on this question the Hearing Examiner released his Initial Decision on
317 October 3, 1955, wherein he concluded that there was no issue relating to the application for extension of time to complete construction and that the consideration to be paid for the assignment of the construction permit did not involve "trafficking", and ordered that the applications in question be granted. On October 24, 1955, the Broadcast Bureau filed exceptions to the Initial Decision, and the Assignor and Assignee jointly replied thereto on November 14, 1955. Mr. H.S. Nakdimen, President and sole beneficial stockholder in Assignor, died on December 20, 1955.

3. On March 6, 1956, a group of residents of Fort Smith, Arkansas, who called themselves the "Citizens Group for Two Television Stations in Fort Smith" filed a petition to set aside the Initial Decision and reopen the record for inquiry into questions of monopoly and concentration of control of communications media which would result if the transfer were effectuated. No oppositions were filed to the petition and the Commission on its own motion scheduled oral argument to determine whether the record should be reopened for consideration of the matters alleged

in the said petition, and the argument was held before the Commission en banc on March 20, 1956.

4. The agreement for the assignment of the construction permit provided for termination by February 1, 1955, unless extended by the parties; and the agreement was extended from time to time, to April 1, 1956. There was no extension beyond that date and the agreement, therefore, expired at that time. Assignee states in the instant petition that it was unable to obtain a further extension "despite assiduous efforts". On April 10, 1956, an application was filed for the involuntary
318 transfer of control of the Permittee, American Television Company, from Hiram S. Nakdimen to Salome Nakdimen, Administratrix of Estate of Hiram S. Nakdimen.^{1/} On the same date said permittee filed a petition requesting dismissal of the above-entitled transfer application asserting that neither the permittee nor Mr. George Hernreich who holds an option for 50% interest in the permittee will further extend the agreement for the assignment of the construction permit. The petitioner, therefore, requests dismissal of the assignment application and grant of the extension application. The petitioner states further that upon the granting of an extension of time to complete construction it will complete the construction of the station.

5. No final action has been taken by the Commission on the Initial Decision of the Hearing Examiner or the petition of the Citizens Group for Two Television Stations in Fort Smith.

6. In view of the events set forth above the application for assignment of the construction permit now has become moot and the hearing record in this proceeding is academic. Inasmuch as nothing remains to be considered by the Commission with respect to the transfer application it should be dismissed.

7. There are no issues in this proceeding directed to the application for extension of time to complete construction, hence there is nothing in the hearing record with respect thereto which requires the

1/ This application (File No. BTC-2211) is still awaiting action.

consideration of the Commission. The Commission, therefore, in its discretion can forthwith grant the extension application, or remove it from hearing status and return it to the processing line for consideration in connection with the processing of the application for involuntary transfer of control of the permittee.

8. In the instant petition, Southwestern Publishing Co. (former Assignee, and hereinafter referred to as "Southwestern") requests that the Initial Decision be set aside and the record be reopened for the taking of evidence with respect to the extension application, and points to the following matters which it feels should be developed:

(a) The Commission does not have sufficient facts with respect to the intentions and capabilities of the Nakdimen estate to proceed with the construction and operation of the station, inasmuch as the Commission does not have before it the value of the estate nor its ability or authority to borrow money to finance the construction.

(b) Uncertainty with respect to ownership of Assignor inasmuch as Mr. George Hernreich has an option for a 50% interest in the Company. That he has advised the Commission he intends to exercise the option, and that although he indicated he might buy out the estate and build the station, he neither evidenced his financial ability to do so, nor made a showing that the estate is willing to sell out to him. With respect to the latter the Commission has been advised by the estate that it has no intention to sell out its interest to Mr. Hernreich.

(c) Before deciding whether the public interest will be served by an extension of the construction permit, the Commission should determine the present qualifications of the persons who will actually own and operate the station. It cannot now be known who will serve as trustees under the trusts created by the will.

(d) Any applications for involuntary or voluntary transfer of control of the permittee should be consolidated for hearing in this proceeding.

320 9. It will be observed that Southwestern is requesting the Commission to engraft upon a moot proceeding a new application^{2/}, and matters to be considered in connection therewith, which have no relationship whatsoever with the issue involved in the above-entitled proceeding, and to extend the existing academic hearing record through additional evidence on entirely different matters. Southwestern also desires to participate in the proceeding although it is not (at least not now) a party in interest with respect to the above-referred to application for involuntary transfer of control.

10. Southwestern had standing in this proceeding originally because it was a co-applicant for approval of the assignment of the construction permit of American Television Company, Inc. In our view, Southwestern lost such status when the assignment application was rendered moot by the expiration of the agreement of assignment, which occurred on April 1, 1956. Accordingly, Southwestern had no standing in this proceeding on April 10, 1956, when it filed the instant petition. The petition contains no facts which would reasonably justify affording the petitioner the relief it seeks. Reference to the matters which Southwestern urges be set for hearing show that Southwestern is merely anticipating the matters which the Commission would, without "prompting" by Southwestern, review in the course of its consideration of the application for involuntary transfer of control.

11. To set the matters--including the application for involuntary transfer of control--urged by Southwestern, for immediate hearing, would be premature and in contravention of Sections 310(b) and 309 (b) of the
321 Communications Act of 1934, as amended. Section 310 (b) provides, among other things, that applications for transfer of control of a corporation holding a construction permit "shall be disposed of as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question * * *." Section 309

2/ See Footnote 1 supra.

sets forth the action to be taken upon applications provided for in Section 308, and subsection (b) thereof provides, in part, as follows:

"If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) [that public interest, convenience, and necessity would be served by the granting thereof], it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining * * *."

The detailed procedure set forth above before designation of an application for hearing needs no elaboration. Nor need we belabor the fact that Southwestern's suggested course of procedure cannot be followed.

Apart from the statutory requirement we believe for the reasons outlined above that the petitioner is neither entitled to the relief sought nor has it set forth any reasons justifying the relief requested.

322 In view of the foregoing, the "Petition to Set Aside Initial Decision and Reopen Record for the Taking of Further Evidence" filed by Southwestern Publishing Company should be DENIED.

Respectfully submitted,

/s/ Robert J. [Illegible] for

Edward F. Kenehan
Chief, Broadcast Bureau

/s/ Earl C. Walck

Earl C. Walck
Attorney
Federal Communications Commission

April 27, 1956

323

(CERTIFICATE OF SERVICE)

325 [April 27, 1956, FCC]

RESPONSE TO "PETITION FOR DISMISSAL
OF ASSIGNMENT APPLICATION AND GRANT
OF EXTENSION APPLICATION"

American Television Company, Inc. has requested that the above-entitled assignment application be dismissed, and that the application for extension of construction permit for a new television station on channel 5 at Fort Smith be granted forthwith. Southwestern Publishing Company reluctantly agrees that in light of the refusal of the other parties to extend the assignment agreement, the application for assignment cannot be granted. Southwestern Publishing Company does not agree, however, that the construction permit for channel 5 should be extended without further proceedings. On the contrary, for the reasons stated in Southwestern's pending petition to vacate the initial decision and reopen the record herein, and for the additional reasons given below, Southwestern believes that the statutory public interest determination which is prerequisite to a grant of an extension of construction permit cannot properly be made on the present record.

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In support whereof Southwestern shows as follows:

A. The Trafficking Question.

The Commission designated these applications for hearing because of the Commission's concern with a possible question of trafficking in a construction permit on the part of the assignor. That question is not rendered moot because the assignment application cannot now be granted. The question as to the assignor's character qualifications has not been resolved, and that question is as important, or more important in determining whether assignor should be given an extension of construction permit, as it would be in determining whether assignor should be permitted to assign the permit. After all, an assignment takes the station out of the hands of the assignor. The extension of construction permit perpetuates the station in assignor's hands.

Southwestern has taken the position that no trafficking was involved here, and it does not repudiate that position now. But there are pending

and unresolved before the Commission exceptions by the Broadcast Bureau to the initial decision, and those exceptions sharply challenge the Examiner's conclusion that no trafficking was involved. Until those questions are resolved, an informed decision as to the public interest cannot be made.

B. Uncertainties as to the Plans and Capabilities of the Applicant.

Nothing in American Television Company, Inc.'s cryptic petition, or its recent cryptic application for involuntary transfer of control of construction permit, resolves the uncertainties adverted to in our petition to set aside the initial decision, filed herein on April 10, 1956. That petition is hereby incorporated herein and made a part hereof by reference.

It would appear from the papers filed that since Mr. Nakdimen's death on December 20, 1955 several involuntary transfers of control of KNAC-TV may have occurred. Mr. Nakdimen's will named three executors (see Exhibit A to Southwestern's petition of April 10, 1956), one of whom was Mr. J.H. Friedman. On Mr. Nakdimen's death, control of KNAC-TV presumably passed to all three executors. However, it appears that only Mr. Friedman ever qualified as executor, so he presumably acquired sole control on January 4, 1956.

At some point not quite clear, Mrs. Salome Nakdimen entered the picture as administratrix, with the will annexed, of Mr. Nakdimen's estate. A letter to the Commission, dated February 25, 1956, was signed by both Mrs. Nakdimen as administratrix and Mr. Friedman as executor. At this point they may have controlled KNAC-TV jointly. But Mrs. Nakdimen apparently did not get formal letters testamentary until March 12, 1956 (see exhibits to Form 316 application filed by American Television Company, Inc. on April 10, 1956). In any event, at some point on or prior to March 12, 1956 Mrs. Nakdimen became sole personal representative of the estate, and thereby acquired control of KNAC-TV.

Our purpose in detailing these facts concerning the administration

of the Nakdimen estate is to make clear two things: (1) the present application for involuntary transfer of control contains insufficient information to justify the conclusion that control actually passed from Mr. Nakdimen to Mrs. Nakdimen, as administratrix, and (2) the uncertainties as to the policies of the estate cannot be resolved on the basis
 328 of past representations made during a period when control of the estate was rapidly changing hands.

In the present petition, American Television Company, Inc. assures the Commission that it "will proceed (as it has previously represented to the Commission) to construct the said television station" (p. 2). But the petition is silent as to whether the estate of Mr. Nakdimen, as presently administered, has the legal power, the financial resources, or the technical ability to construct and operate the station. The Commission would be abdicating its duty to the public of the Fort Smith area, as well as its statutory duty to make grants only where the public interest will affirmatively be served thereby, if it were to grant this application in the dark. The Commission now has before it practically no information as to the plans, capabilities or resources of the Nakdimen estate. The Commission should require the applicant to make a full disclosure of its plans, if it has plans, before the Commission seriously considers making any grant of extension of construction permit.

Conclusion

For the foregoing reasons, it is respectfully urged that the petition of American Television Company, Inc. be denied in so far as it requests an immediate grant of the application for extension of construction permit for station KNAC-TV. It is further urged that the petition of Southwestern, filed April 10, 1956, be granted forthwith.
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Respectfully submitted,

SOUTHWESTERN PUBLISHING COMPANY

By Haley, Doty & Wollenberg

/s/ Andrew G. Haley

/s/ J. Roger Wollenberg
 * * * * *

1735 DeSales St., N.W.,
 Wash. 6, D.C., Its Attorneys

April 27, 1956

Southwestern Radio and Television Company, permittee of station KFSA-TV on Channel 22 at Fort Smith, Arkansas, which is a wholly-owned subsidiary of Southwestern Publishing Company, joins in the foregoing pleading.

**SOUTHWESTERN RADIO AND
TELEVISION COMPANY**

By Haley, Doty & Wollenberg

/s/ Andrew G. Haley

/s/ J. Roger Wollenberg

Broadcasting-Telecasting Building
1735 DeSales Street, N.W.
Washington 6, D.C.

April 27, 1956

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(CERTIFICATE OF SERVICE)

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[May 1, 1956, FCC]

REPLY TO OPPOSITIONS TO PETITION TO SET ASIDE
INITIAL DECISION AND REOPEN RECORD

I. Reply to Opposition of American Television Company, Inc.

The Opposition of American Television Company, Inc., is a singularly abusive and uninformative pleading. For the reasons stated below, the abusiveness is wholly unwarranted. But the important consideration from the standpoint of the public interest is that American Television Company, Inc., has failed to provide the Commission with the facts essential to an informed judgment upon the application for extension of construction permit pending before it.

It was pointed out in our petition that the Commission does not have before it any information as to the ability or legal authority of the Nakdimen Estate to finance the construction and operation of Station KNAC-TV. No information on this crucial question is supplied in the present Opposition. American Television, Inc. does assert that Mr. Hernreich has

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responsibility to assist in financing the station under the Hernreich-Nakdimen agreement. But Mr. Hernreich at this point is a stranger to the permittee. He has never exercised his stock option. Until and unless he does so and until and unless the Commission approves the resultant transfer of control of KNAC-TV, Mr. Hernreich's liability is rather uncertain. Indeed, the Hernreich-Nakdimen agreement appears to contemplate that either Mr. Hernreich or Mr. Nakdimen might fail to advance the necessary funds, since the Agreement includes the following provision:

"(a) Nakdimen, Hernreich and American hereby agree that if, as and when American calls upon Nakdimen to fulfill his stock subscription agreement (or any part thereof) Hernreich will assume one-half of the obligation of the stock subscription agreement and pay to American one half of the sum that American calls upon Nakdimen to pay. Upon the payment of such sums of money to American, Hernreich shall receive one (1) share of stock of American for each One Hundred Dollars (\$100.00) he pays to

American, which shall also be the same price at which Nakdimen purchases his shares. When a call is made of Nakdimen to fulfill his stock subscription or any part thereof, the corporation, through its Secretary shall immediately notify Nakdimen and Hernreich by registered mail of such fact and shall indicate in the communication the amount of the total call. Nakdimen and Hernreich shall each pay to the corporation one-half of such amount within thirty days of the date of the return registered receipts. Should either Nakdimen or Hernreich fail to pay his one-half share within such period of time (and the other party having paid his share) the delinquent party shall forfeit all rights to acquire or receive any stock of American, shall thereupon surrender to the corporation any stock held by him or in which he has an equitable interest (receiving from the corporation \$100 for each share thus surrendered) and shall thereupon resign his office and/or directorship in the corporation and his nominees of the Board shall do likewise. (The preceding sentence shall apply not only to Nakdimen and Hernreich but shall be applicable to any person or persons who own stock at the time a call by the Board is made pursuant to December 21, 1953 subscription agreement.) Any employment agreement by either party with the Corporation shall thereupon be immediately terminated. It is distinctly understood and agreed that when American calls upon Nakdimen to honor his stock subscription agreement of December 21, 1953, his obligation shall be only one-half of that which he is called upon to meet and upon the payment of one-half of the amount he is called upon to meet, his obligation for that call upon him shall have been discharged."

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American Television also repeats its assurance that it will build the television station, and cites the statement on behalf of the Estate on February 25, 1956 that the Estate at that time had no intention of selling out to Mr. Hernreich. Since that time, one of the signatories, Mr. Friedman, the Executor, has resigned. And even if this statement should still be correct as of May, 1956, it does not explain how the Estate

proposes to finance construction, or whether it has any plans with respect to obtaining experienced personnel to operate the station.

American Television points out that the trustees under the Nakdimen Will are given broad power to invest the funds of the estate as they see fit. But that does not establish (1) that the Estate has the necessary funds, or (2) that if it does the trustees will be willing to risk them in a television venture. Our contention that the authority of the Estate to borrow funds is severely limited (see Petition, p. 4) has not been answered by American Television. And in any event, American Television cannot speak for the Nakdimen trustees, whoever they may ultimately turn out to be.

335 Today, it cannot even be ascertained whether the Nakdimen Estate is solvent, since the time for filing claims against the estate does not expire until July 25, 1956. During the period of the administration of the Estate, and prior to distribution (which cannot lawfully take place before September 25, 1956) no action of substance can be taken with respect to the property of the Estate without the prior approval of the Probate Court of Sebastian County, Arkansas.

It would seem axiomatic that the Commission should ascertain who will control KNAC-TV before it grants an extension of construction permit. Southwestern pointed out in its petition that the identity of the trustees of the trusts created by the Nakdimen Will is in great doubt. This is because the same persons who were named as trustees were named as executors, and each executor has resigned or been removed* by the

* The records of the Probate Court reflect the fact that on January 7, 1956 an affidavit was filed on behalf of Mrs. Nakdimen requesting revocation of letters testamentary issued to Executors Aaronson and Bershof on the grounds, inter alia, that (1) they had acted without concurrence of the third executor, (2) they had a possible conflict of interest with the estate, and (3) that they had induced the widow to sign their petition for probate on the representation that only in this way could the will be probated. On the same day the Court revoked the letters testamentary as to Aaronson and Bershof.

336 probate court (Petition 4-5). It seems highly unlikely that persons found not acceptable as executors, or who resigned as executors, would be permitted to, or would be willing to, serve as trustees under the same Will.

American Television's answer to this argument is both inaccurate and abusive. It flatly asserts that our statement about the removal and resignation of the directors was a "false statement" and that "Petitioner could have ascertained the facts by examining the Court records" (American Tel. Opp. 3). The facts, however, support our statement, not that of American Television. It is regrettable that they have to be gleaned from Court records instead of from disclosures to the Commission which American Television should have made.

The Will of Mr. Nakdimen named but three executors:

J. H. Friedman

M. Bershof

Alfred Aaronson

(Ex. A to Petition of Southwestern, p. 6). Contrary to the unsupported assertion of American Television (Opp. 3), Mrs. Nakdimen was not one of the "original appointees" under the Will. Indeed she is not now, and never has been an executrix of the estate. After Executors Aaronson and Bershof were removed (p. 3, supra) she was named co-administratrix with the will annexed along with Executor Friedman. Since March 12, 1956, she has held a Court appointment as sole administratrix with the Will annexed. The exhibit to American Television's recent application for involuntary transfer of control contains a copy of the resignation of the third executor, Mr. Friedman.

337 Thus the facts are as petitioner stated them, and American Television's intemperate accusation of falsity has returned to roost. But the critical fact is not that American Television has made reckless accusations based upon misconstruction of the facts. The critical fact is that the Commission does not have before it any method of ascertaining who will actually control the Nakdimen estate once administration is completed and the testamentary trusts are established. As noted,

it seems highly improbable that the trustees named in the Will actually will serve as such. And even assuming that the named trustees will be permitted to and will serve (as American Television seems to imply but does not affirmatively state (Opp. p. 3)), the Commission has no evidence of their attitudes, intentions or capabilities with respect to operation of a television station. *

338 The uncertainty concerning American Television is not limited to the uncertainties involving the Nakdimen estate. Under the Hernreich-Nakdimen agreement above referred to the initiative for activating the obligations of Nakdimen and Hernreich is vested with the Board of Directors of American Television. This Board will presumably make the call only if its sole beneficial stockholder, the Nakdimen estate, so desires. But even the ultimate composition of the Board is in doubt. Paragraphs 4 and 5 of the Hernreich-Nakdimen agreement provided as follows:

"4. Upon a grant of the American application by the Commission it shall amend its By-laws so as to provide for the following:

- (a) The total number of Directors shall be seven (7) in number rather than three (3), as presently specified by its By-laws.
- (b) American shall amend its By-laws so as to provide that the President shall be elected for a term of five (5) years rather than one (1) year; and Nakdimen shall be elected at the Board of Directors' meeting following the change in the By-laws, for a five (5) year term as President.

"5. Upon a grant of the American's application (BPCT-842) by the Commission and the amendment of its by-laws as set forth in Paragraph 4 above, the parties shall file with the

*One of the three, Mr. Friedman, did sign American Television's letter of February 25, 1956 to the Commission, but that was in his capacity as executor not trustee. And almost immediately thereafter he resigned as executor.

Federal Communications Commission, FCC Form 315 requesting authority to the transfer of control of the corporation and the Board of Directors of the said corporation hereby covenants that it will authorize American to take appropriate steps for the filing of the said application as soon as possible. Upon the grant of this Form 315, American shall issue to Hernreich three (3) shares of its common stock and Hernreich shall pay for those three (3) shares the sum of \$300. Two of these three (3) shares may be held by his nominees for the Board of Directors."

Apparently this portion of the agreement has never been fully implemented. Should it now be implemented, the Board would be expanded from three to seven, and four new members -- a majority -- would be added to the Board. Who would these individuals be? Will this portion of the Agreement be implemented or become a dead letter?

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The Commission and the public are entitled to know before the Commission extends the KNAC-TV construction permit and ties up this valuable frequency for an additional period.

The Opposition of American Television contains a series of specific subparagraphs replying to the points raised in Southwestern's petition. These replies have largely been discussed above, but for the convenience of the Commission we shall summarize our comments below, using the same letter designations as are used by American Television:

(a) Statement with respect to executors. It was demonstrated above that petitioner's statement was correct, and that American Television is in error (supra, pp. 3A-5).

(b) The identity of the trustees. This is completely uncertain (supra, pp. 3-5).

(c) Financing. Mr. Hernreich is not a party to the permittee, is not obligated to the Commission to become such a party, and could not become such a party under the terms of the Hernreich-Nakdimen agreement without prior Commission consent, because a transfer of

negative control would be involved. The permittee should be required to establish that it can build its station without a transfer of negative control to Hernreich, or it should apply for such a transfer concurrently, so that the Commission can pass upon Mr. Hernreich's qualifications as of the present. For American Television to rely on the Hernreich option is the equivalent of saying to the Commission, "Let us have the extension of construction permit first, and afterward we shall effect
340 a transfer of control in order to finance it."

(d) Intentions of Nakdimen Estate. The intentions of the Estate cannot be firmed up until control of the Estate is determined, (supra, pp. 3-5).

(e) Estate's obligations under Hernreich-Nakdimen agreement. As successor to the Nakdimen stock, the Estate has certain obligations under the Hernreich-Nakdimen agreement. But the agreement itself was not in terms made binding on heirs, and it is quite unclear, for example, whether the personal obligation of Mr. Nakdimen to lend American Television \$150,000 (an obligation one-half of which was to be assumed by Mr. Hernreich) survives Mr. Nakdimen's death.

(f) Power of the trustees to build the station. The trustees have broad power to invest, but limited power to borrow (supra, p. 3). And the Commission has not been enlightened as to whether the Estate has on hand sufficient funds to build the station.

(g) Certainty as to Mr. Hernreich's intentions. Will the ultimate trustees under the Nakdimen Estate adhere to the Estate's previous representations as to refusal to sell to Mr. Hernreich? If Mr. Hernreich is not allowed to buy out the Estate, will he carry out his commitments under the Hernreich-Nakdimen agreement? Does he have the financial ability to do so? Does he today possess the necessary qualifications? The Commission should have answers to these pertinent questions.

341 (h) Control of the construction permit. When Southwestern's petition was filed, there was not on file with the Commission any authoritative representation as to the control of the Nakdimen Estate.

After that petition was filed, American filed its application for involuntary transfer of control. The papers there filed continue to leave an area of uncertainty, as is pointed out in Southwestern's Response, filed April 27, 1956, to the petition of American Television for an immediate grant. That Response is hereby incorporated herein and made a part hereof by reference.

II. Reply to Opposition of Broadcast Bureau

The Bureau contents itself with opposing Southwestern's petition on technical grounds. The Bureau apparently believes that this entire proceeding has become moot because the assignment contract has been allowed to lapse. But the Commission may not be presumed to engage in idle acts. It could have granted the application for extension of construction permit a year ago. Instead it designated it for hearing. As indicated in our Response to the petition for immediate grant above referred to, the character question raised by the trafficking charge clearly must be resolved before the extension application can properly be granted.

It also is clear that the Commission must consider the public interest
 342 as of the time it acts.* New facts, or even old facts of which the Commission was not previously aware, must be considered if an informed decision in the public interest is to be reached. See colloquy of Chairman McConnaughey in the oral argument in this case which was ordered on the Commission's own motion (Transcript 182-5). As was pointed out in Southwestern's petition, the changed facts with respect to the identity, abilities and intentions of those controlling the permittee must be considered if the Commission is to act rationally in passing on application for extension of the permit.

It will not do to suggest, as does the Bureau, that all the questions we have raised can properly be considered only in connection with the

*Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 225 F. 2d 511; City of Pittsburgh v. Federal Power Commission (C.A. D.C. No. 12,895, decided March 8, 1956); Paramount Television Productions, Inc., 8 Pike & Fisher, R.R. 459, 462.

application for involuntary transfer of control. Since the transfer of control has occurred, the Commission is faced with in effect a new permittee. It must consider all pertinent facts with respect to that permittee before passing on any application by it.

343 It may be, as the Bureau urges, that a so-called McFarland letter would have to be sent to the permittee before the involuntary control application could be consolidated for hearing with the present proceeding. But that does not derogate from the soundness of our contentions (1) that the application for extension of construction permit should not be granted until the record is brought up to date and the Commission is satisfied on the basis of such record that the grant will serve the public interest, and (2) that some of the questions raised in connection with the transfer of control application are identical to questions with respect to the extension application, so that a consolidation of proceedings on the two applications would conduce to orderly administration.

CONCLUSION

For the foregoing reasons, those urged in the petition, and those urged in Southwestern's Response of April 27, 1956 to the petition filed by American Television, the initial decision should be vacated, and the record reopened and brought up to date. **ORAL ARGUMENT IS REQUESTED.**

Respectfully submitted,

SOUTHWESTERN PUBLISHING COMPANY

By: Haley, Doty & Wollenberg

/s/ Andrew G. Haley

/s/ J. Roger Wollenberg

Its Attorneys

May 1, 1956

344 Southwestern Radio and Television Company, permittee of Station KFSA-TV on Channel 22 at Fort Smith, Arkansas, which is a wholly-owned subsidiary of Southwestern Publishing Company, joins in the foregoing pleading.

SOUTHWESTERN RADIO AND TELEVISION COMPANY

By: Haley, Doty & Wollenberg

/s/ Andrew G. Haley

/s/ J. Roger Wollenberg

Broadcasting-Telecasting Building

* * *

May 1, 1956

Its Attorneys

[CERTIFICATE OF SERVICE]

346 [Received May 1, 1956, FCC]

REPLY TO "RESPONSE TO 'PETITION FOR DISMISSAL OF ASSIGNMENT APPLICATION AND GRANT OF EXTENSION APPLICATION' "

Comes now American Television Company, Inc. (hereinafter referred to as American), and files its Reply to the "Response to 'Petition For Dismissal Of Assignment Application And Grant Of Extension Application' " of Southwestern Publishing Company (hereinafter referred to as Southwestern), in the aforecaptioned matters.

1. In the introductory paragraph, Southwestern "reluctantly agrees" that since the agreement between American and Southwestern was not extended after April 1, "the application for assignment cannot be granted." Therefore, if it cannot be granted, it should be dismissed, as American has requested the Commission to do.

2. Southwestern correctly states that the application for assignment to it had been designated for a hearing on the issue of whether the contract constituted "trafficking" in a construction permit. From this simple fact, Southwestern makes the unique argument that the assignor's

347 "character qualifications" were placed in issue. First of all, as Southwestern concedes, it has consistently, heretofore, taken the position that "no trafficking was involved" in the contract between American and Southwestern. This being so, it ill behooves Southwestern to now suggest not only that there is a "trafficking" question left unresolved but, in addition, that American's "character" has been placed in issue. Furthermore, had the Commission had any doubt about the character of American it would have specified such an issue. In no case before the Commission where the question of "trafficking" has been involved has the Commission even intimated that such a question raised a "character" issue.

3. The remainder of Southwestern's Response is, in reality, directed toward the Commission's application form, rather than the application of American. American completed the application for the extension of time within which to complete construction and the application for the involuntary transfer of control of American and Southwestern nowhere suggests that the application is, in any way, incomplete or defective.

4. American argues that the Commission has before it "practically no information as to the plans, capabilities or resources of the Nakdimen Estate." This is not true. The applicant has stated, in the application for the involuntary transfer of control that the American plans have not changed nor will they change by the grant of the application. As far as the "resources" of the Estate are concerned, it is evident from the Will of H. S. Nakdimen that all of his assets have been transferred to the Estate and (with one very minor exception) all of the assets may be used by the Executrix as prudent business judgment dictates.

5. It is to be borne in mind that the application for extension of completion date does not involve comparative considerations. As long as the Executrix satisfies the Communications Act's requirements, the

348 Commission has the power to make the grant although, of course, if the Commission desires further information concerning the Executrix, it also has the power to request such information. The Commission should

not designate for further hearing the application merely because a disgruntled and disappointed proposed assignee--without alleging any facts adverse to the Executrix--pleads that it desires to acquire, for its own use, the construction permit.

Respectfully submitted,

AMERICAN TELEVISION COMPANY, INC.

By: /s/ Marcus Cohn
Cohn & Marks

* * *

Its Attorney

May 1, 1956

[CERTIFICATE OF SERVICE]

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MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley dissenting; Commissioner Mack not participating.

1. The Commission has before it for disposition in the above-entitled matters the following: (1) Initial Decision of Examiner Basil P. Cooper, in the above-entitled proceeding, released the 3rd day of October, 1955, (2) "Petition To Set Aside Initial Decision and Reopen Record" filed on March 6, 1956 by the "Citizens Group for Two Television Stations in Fort Smith," (3) "Petition For Dismissal of Assignment Application and Grant of Extension Application" filed April 10, 1956, by American Television Company, Inc., (4) "Petition To Set Aside Initial Decision and Reopen Record For the Taking of Further Evidence" filed by the Southwestern Publishing Company on April 10, 1956, (5) "Response To 'Petition For Dismissal of Assignment Application and Grant of Extension Application' " filed by Southwestern Publishing Company on April 27, 1956, (6) "Opposition To 'Petition To Set Aside Initial Decision And Reopen Record For The Taking of Further Evidence ' " filed by American Television Corporation, Inc., on April 27, 1956, (7) 'Opposition to 'Petition To Set Aside Initial Decision and Reopen

Record For The Taking of Further Evidence' " filed by the Broadcast Bureau on April 27, 1956, and (8) "Reply To Oppositions To 'Petition To Set Aside Initial Decision and Reopen Record' " filed by Southwestern Publishing Company on May 1, 1956.

351 A 2. An application to assign the construction permit of American Television Corporation (hereinafter American) for a commercial television station to operate on Channel 5 in Fort Smith, Arkansas to Southwestern Publishing Corporation (hereinafter Southwestern) was filed on December 20, 1954. American's construction permit had been outstanding since June 3, 1954, but no construction had been commenced. On December 27, 1954 American filed an application for extension of time within which to construct the station. On January 17, 1955 a petition was filed by the Tulsa Broadcasting Company (licensee of KFPW, Fort Smith, Arkansas) to designate for hearing the application for the assignment of the construction permit.

3. Thereafter, on February 16, 1955 the Commission sent American a "McFarland" letter embodying questions raised by the Tulsa petition, to-wit, (1) the possibility of the assignment contract constituting trafficking in a construction permit, (2) whether the public interest would be served "by permitting Channel 5 to get into the hands of the owners of the only daily newspaper in Fort Smith (Southwestern) who also control Stations KFSA and KFSA-FM in Fort Smith, " and (3) that, because the application for extension of time to construct the station, filed on December 27, (revealing that a contract had been entered into with the Allen B. DuMont Laboratories, Inc. for the purchase of equipment to construct the station) made no mention of the assignment application, "the question is raised as to whether American Television Corporation, Inc., has been entirely candid with the Commission concerning its intention to complete construction." ^{1/}

^{1/} Reference is made to the "McFarland" letter and American's reply thereto.

4. On March 18, 1955 American filed a reply to our "McFarland" letter which reply was wholly satisfactory on all phases of the letter except that portion dealing with trafficking in a construction permit. Consequently, a hearing was instituted before a Hearing Examiner, in which the Commission limited the issues to the trafficking question and consolidated the application for extension of time for constructing the station for, obviously, the answer to the question of extending the time to construct would be determined by the conclusion to the trafficking question. The Hearing Examiner issued his Initial Decision on October 3, 1955 in which it was concluded that trafficking did not exist and that the public interest, convenience, and necessity would be served by granting the application to extend the time to construct.

352 5. The parties waived oral argument in the matter (the Broadcast Bureau had filed exceptions to the Initial Decision and American and Southwestern had filed a joint Brief in reply.) Thereafter the Commission ordered an oral argument, on its own motion, as a result of requests from a "Citizens Group For Two Television Stations In Fort Smith" which took the position that, because Southwestern would relinquish a UHF license which it now holds for its operating station KFSA-TV (Channel 22) in the event of the assignment being approved, Fort Smith would thereafter have only one television station. The "Citizens Group" was not, and is not, a party to this proceeding. Argument was held on March 20, 1956 before the Commission en banc, in which counsel for the "Citizens Group" and the parties appeared.

6. The assignment contract, which had been intermittently renewed by American and Southwestern pending our disposition of the matter, expired by its own terms on April 1, 1956 and the assignor, in its petition (item 3, paragraph 1, supra) has notified the Commission that it will not review the contract, but intends to proceed with construction of the station. Southwestern concedes that the assignment contract no longer exists.

7. In our view, all the pleadings now before us for disposition filed by Southwestern are moot by virtue of the expiration of the assignment

contract and accordingly they must be denied. For the same reason, the proceeding itself is moot except for the limited purpose of passing upon the aforesaid petition of American. We agree with the Broadcast Bureau that Southwestern had no standing as a party in interest when it filed its April 10 pleading (item 4, supra) and subsequent pleadings and should not now be permitted to extend the existing hearing record through additional evidence on entirely different matters.

8. As indicated in paragraph 4, supra, our action in consolidating into a single proceeding both the assignment application and the application for extension of time to construct was dictated by the close relation of the latter to the former and for convenience in disposition. There is no trafficking issue left, and that was the only issue under our order designating the applications for hearing that could be adversely determinative of the extension application. The mere passage of time, through no fault of American, between the filing date of the extension application and the present cannot adversely affect the extension application for the reason that the two applications were intimately bound up with one another time-wise.

9. Although the issue as to trafficking in licenses has been mooted we have reviewed the record of the hearing with respect thereto and concur in the conclusion reached thereon by the Examiner in this regard at paragraph 9 of the Initial Decision to which reference has herein been made.

10. We conclude that the public interest, convenience, and necessity will be served by granting American's petition to dismiss the assignment application and grant the extension application. The turn of events has rendered moot the petition of the "Citizens Group."

352 A 11. IT IS ACCORDINGLY ORDERED, This 20th day of June, 1956, That the "Petition For Dismissal of Assignment Application and Grant of Extension Application" filed by American Television Company, Inc. on April 10, 1956 BE AND IT HEREBY IS GRANTED: and

IT IS FURTHER ORDERED, That, American Television Company, Inc. shall have the standard time initially given applicants within which to construct the station; and

IT IS FURTHER ORDERED, That, the "Petition To Set Aside Initial Decision and Reopen Record," filed on March 6, 1956 by the "Citizens Group For Two Television Stations in Fort Smith" and the "Petition to Set Aside Initial Decision and Reopen Record For the Taking of Further Evidence" filed by the Southwestern Publishing Company on April 10, 1956 BE AND THEY HEREBY ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Mary Jane Morris

Secretary

Released: June 22, 1956

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FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

PUBLIC NOTICE

Report No. 2877

33778

July 3, 1956

BROADCAST ACTIONS

The Commission, by the Broadcast Bureau, took the following actions on the dates shown:

WFCR

OK B/cg Corp.

Fairfax, Va.

American Broadcasting-
Paramount Theatres, Inc.
New York, N. Y.

Actions of June 29

Granted assignment of license to O.K.

Broadcasting Corporation (assignor will assign the license and transfer all assets to the assignee in exchange for stock and notes of assignee) (BAL-2352).

Granted informal application for modification of permit to supply television programs broadcast in the United States over television broadcast stations licensed to American Broadcasting-Paramount Theatres, Inc. to certain Canadian television broadcast stations

(CBET and CBMT, Montreal, Quebec, et al.), for broadcast by these stations in Canada. Program material may be delivered via microwave relay facilities, operated by common carriers, air or rail express. The authority is for the period beginning date of grant, EST., and ending 3 a. m., EST., 2-1-57.

KCCT-FM

International Radio Co.
Corpus Christi, Tex.

Granted license covering changes in licensed station (BLH-1126).

KAO-64

Josh Higgins B/cg Co.
Waterloo, Iowa

Granted license for STL broadcast station (BLST-80).

KB-8990, 9234

Wm. C. Grove, Inc.
Sidney, Nebr.

Granted licenses to replace expired licenses for remote pickup stations (BLRE-2365, 2366).

KC-3268, 3269

Lakes Area B/cg Co.
Pryor, Okla.

Granted licenses to replace expired licenses for remote pickup stations (BLRE-2370, 2371).

The following were granted licenses for remote pickup stations:

KC-7654, KPOJ, Inc., Portland, Oreg. (BLRE-2373); KC-6997, Fort Massac B/cg Co., Metropolis, Ill. (BLRE-2367); KC-3333, KAG-226, KC-3334, TV Colorado, Inc., Colorado Springs, Colo. (BLRE-1491-3); KC-7443, Giles B/cg Co., Narrows, Va. (BLRE-2364); KOH-786, KPOJ, Inc., Portland, Oreg. (BLRE-2374).

WKNA-FM

Joe L. Smith, Jr., Inc.
Charleston, W. Va.

Granted modification of license to change studio location to Garfield Ave., Bownemont, W. Va. (BMLH-99).

353 A KEG-95

Plattsburg B/cg Corp.
Plattsburg, N. Y.

Granted CP for new STL station (BPST-108).

KC-8614 **Granted CP and license for new remote pickup station (BPRE-2854, BLRE-2375).**
Agnes W. Dowling, Trustee
The WOOF Trust
Dothan, Ala.

The following were granted CPs for new remote pickup stations:
KKR-274, Top O'Texas B/cg Co., Pampa, Tex. (BPRE-2858); **KC-8933**, J. Homer McKinley, Big Spring, Tex. (BPRE-2857); **KKR-273**, **KC-8931**, Mt. Pleasant B/cg Co., Mt. Pleasant, Tex. (BPRE-2735, 2847); **KMH-230**, **KTTV, Inc.**, Hollywood, Calif. (BPRE-2846).

KHSL-TV **Granted CP to change ERP to visual 234 kw, aural 117 kw, change type of transmitters and antenna and make other equipment changes; antenna 1287 ft. (BPCT-2121).**
Golden Empire B/cg Co.
Chico, Calif.

WAFB-TV **Granted modification of CP to change ERP to visual 182 kw, aural 97.7 kw, make changes in antenna system and minor equipment changes (BMPCT-3924).**
Modern B/cg Co. of
Baton Rouge, Inc.
Baton Rouge, La.

The following were granted extensions of completion dates as shown **WJHL-TV**, Johnson City, Tenn., to 1-28-57; **WISE-TV**, Asheville, N. C., to 12-29-56; **WGBS-TV** (Main trans. and ant.), Miami, Fla., to 1-20-57; **WGBS-TV** (Aux), Miami, Fla., to 1-20-57; **WKNO-TV**, Memphis, Tenn., to 1-23-57; **KCRG-TV**, Cedar Rapids, Iowa, to 1-5-57; **KATV**, Pine Bluff, Ark., to 1-19-57; **WNYT-TV**, Buffalo, N. Y., to 1-23-57; **WHTN-TV**, Huntington, W. Va., to 10-24-56; **KARK-TV** (main trans. & ant.), Little Rock, Ark., to 1-20-57; **KAUS**, Austin, Minn., to 10-1-56, conditions; **WMIC**, Monroe, Mich. to 7-30-56; **WARK**, Hagerstown, Md., to 9-1-56.

Actions of June 28

WWT-83 **Granted CP for new TV STL station (BPTS-313).**
Supreme B/cg Co., Inc.
of Puerto Rico
Mayaguez, P. R.

KORD

Music B/crs

Yakima, Wash.

Granted authority to operate transmitter by remote control from Road 28 & Highway 410, Sahara Motel, Pasco, Wash.

Actions of June 27**WBEE**

Rollins B/cg., Inc.

Harvey, Ill.

Granted modification of CP to change type transmitter and make changes in DA pattern; conditions (BMP-7259).

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The following stations were granted authority to operate transmitters by remote control:

WFNS, WFNS-FM from Corner Maple Avenue and Broad Streets, Burlington, N. C.; WFSU-FM, from Control Room on ground floor of Music Building, Tallahassee, Fla.; KAND, from 609 West 7th Ave., Corsicana, Tex.

Actions of June 26**KNAC-TV**

American Television Co.,

Fort Smith, Ark.

Granted involuntary transfer of control of permittee corporation from Hiram S.

Nakdimen to Salome Nakdimen, Administratrix of the estate of Hiram S. Nakdimen, deceased (BTC-2211).

WAIU-FM

Wabash-Peru B/cg Co., Inc.

Wabash, Ind.

Granted license for FM broadcast station (BLH-1103).

WMUB

The President & Trustees

of the Miami University

Oxford, Ohio

Granted CP to replace expired permit (BPED-255, as mod. which authorized changes in licensed station) which expired 6-1-56 (BPED-305); Granted modification of CP to change type transmitter; change ERP to 830 watts; antenna height 130 ft. (BMPED-306).

KIS-44

Appalachian B/cg Corp.

Bristol, Va.

Granted CP for new TV STL station (BPTS-384).

<p>KC-8909 Appalachian B/cg Corp. Mobile, area Southwest Virginia and Northeast Tenn.</p>	<p>Granted CP for new TV Pickup station (BPTP-195).</p>
<p>KK2XGG Richard R. Hayes San Antonio, Tex.</p>	<p>Granted CP for new Experimental TV Translator broadcast station (BPEX-141).</p>
<p>KC-8907 Clinton B/cg Corp. Clinton, Iowa</p>	<p>Granted CP and license for new remote pickup station (BPRE-2856;BLRE-2363).</p>
<p>KC-7389 Midwest Television, Inc. Champaign, Ill.</p>	<p>Granted license for remote pickup station (BPRE-2355).</p>
<p>KC-8906 Ohio Valley B/cg, Inc. New Albany, Ind.</p>	<p>Granted CP for new remote pickup station (BPRE- 2848).</p>
<p>WQED Metropolitan Pittsburgh Educational Television Station Pittsburgh, Pa.</p>	<p>Granted CP to change ERP to visual 138 kw, aural 69.2 kw, make minor changes in transmitters and install power amplifiers, and make other equip- ment changes (BPET-61).</p>

354 A The following stations were granted authority to operate transmitters by remote control: KVOL, from 519 S. Buchanan, Lafayette, La., while using nondirectional antenna; WOXF, from 111 Littlejohn St., Oxford, N. C.

The following were granted extensions of completion dates as shown: WATR-TV, Waterbury, Conn., to 12-29-56; KGW-TV, Portland, Oreg., to 10-1-56; KOV-84, Idaho Falls, Idaho, to 1-16-57; KEPR-TV, Paco, Wash., to 9-20-56; KIMA-TV, Yakima, Wash., to 9-20-56; KINY-TV, Juneau, Alaska, to 12-31-56.

Actions of June 25**KSLJ**

Helen and C. A. Lee,
Executors of the Estate
of T. W. Lee, Deceased
Gladewater, Tex.

Granted permission to sign-off at
6:30 p. m., CST, during June through
August, except when broadcasting special
events when station may operate up to
licensed sign-off time.

WCUM

The Tower Realty Co.
Cumberland, Md.

Granted license covering changing the
antenna-transmitter and studio location
to Williams Road, Cumberland, and
the installation of a new transmitter
(BL-6204).

WKAQ

El Mundo B/cg Corp.
San Juan, P. R.

Granted license covering the installation
of the old main transmitter as an alter-
nate main transmitter; condition (BL-6203).

KDKA-FM

Westinghouse B/cg Co., Inc.
Pittsburgh, Pa.

Granted license covering changes in
licensed station (BLH-1125).

WAGA-FM

Storer B/cg Co.
Atlanta, Ga.

Granted license covering changes in
licensed station (BLH-1124).

KFTM

Morgan County B/cg Co.
Fort Morgan, Colo.

Granted modification of CP to make
changes in transmitting equipment; con-
dition (BMP-7262).

WIUS

West Indies Caribbean Radio
Christiansted, V. I.

Granted modification of CP to change
antenna height to 205 ft., name to Mary
Louise Vickers tr/as Virgin Islands
B/cg System, and make changes in antenna
system (BMPH-5054).

The following were granted extensions of completion dates as
shown: WALB-TV, Albany, Ga., to 12-23-56; WBNY-FM, Buffalo,
N. Y., to 1-15-57; KDLS, The Dalles, Oreg., to 12-30-56, conditions.

FCC Form 316 Form Approved
 Budget Bureau No. 52-2124
 United States of America
 Federal Communications Commission

APPLICATION FOR CONSENT TO ASSIGNMENT OF RADIO BROADCAST STATION CONSTRUCTION PERMIT OR LICENSE OR TRANSFER OF CONTROL OF CORPORATION HOLDING RADIO BROADCAST STATION CONSTRUCTION PERMIT OR LICENSE
 (Short Form)

Adopted

GENERAL INSTRUCTIONS

A. This form is to be used when applying for authority for Assignment of a Radio Broadcast Station Construction Permit or License or for Consent to Transfer of Control of Corporation Holding Radio Broadcast Station Construction Permit or License where:

1. There is an assignment from an individual or individuals (including partnerships) to a corporation owned and controlled by such individuals or partnerships without any substantial change in their relative interests.
2. There is an assignment from a corporation to its individual stockholders without effecting any substantial change in the disposition of their interests.
3. There is an assignment or transfer by which certain partners or stockholders retire but no new ones are brought in, provided that the interest transferred is not a controlling one.
4. There is a corporate reorganization which involves no substantial change in the beneficial ownership of the corporation.
5. There is an involuntary transfer to an Executor, Administrator or other court appointed officer caused by death or legal disability. (Note: This form does not cover assignments (or transfers) from the Executor, Administrator or other court appointed officers to the ultimate beneficiary.)
6. Where there is an assignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests.

B. The Commission reserves the right to require refiling of the application on Forms 314 or 315 if in its judgement this form does not apply to the assignment or transfer when approval is sought.

C. Prepare and file three copies of this form and all exhibits and swear to one copy. File with Federal Communications Commission, Washington 25, D. C.

D. Number exhibits serially in the space provided in the body of the form and list each exhibit in the space provided on the back of this sheet. Date each exhibit.

E. The names of the applicants shall be the exact corporate names, if corporations; if partnerships, the names of all partners and the names under which the partnerships do business; if unincorporated associations, the names of executive officers, their offices, and names of the associations.

F. Information called for by this application which is already on file with the Commission need not be refilled in this application provided (1) the information is now on file in another application or FCC form filed by or on behalf of these applicants; (2) the information is identified fully by reference to the file number (if any), the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to and (3) after making the reference, the applicants state: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

G. This application must be executed by applicants, if individuals; by partners of applicants, if partnerships; by officers of applicants, if corporations or associations; or by attorneys of applicants only under conditions shown in Section 1.303, Rules Relating to Organization and Practice and Procedure, in which event satisfactory evidence of disability of applicant or his absence from the Continental United States and authority of attorney to act must be submitted with application.

H. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

File No. _____

Name and post office address of assigner (or transferor)
Hiram S. Nakhimov, Deceased
Midnight Acres, Euper Lane
Fort Smith, Arkansas

Send notice and communications to the following-named person at the post office address indicated.
Cohn & Marks, Cafritz Bldg.
Washington 6, D. C.

Name and post office address of assignee (or transferee)
Salome Nakhimov, Administratrix of
Estate of Hiram S. Nakhimov
Euper Lane, Fort Smith, Arkansas

Name and post office address of licensee (or permittee)
American Television Company, Inc.
421 Garrison Ave.
Fort Smith, Arkansas

1. Authorization held, the control of which will be

Assigned Transferred (Check one)

Call letters **KNAC-TV** Location **Fort Smith, Arkansas**

Class of station File number

Standard
 FM
 Television **BMPCT-2757**

Authorizations of any Remote Pickup, STL, or other stations held by licensee (or permittee)

Call letters File numbers

State file numbers of any other pending applications which involve the licensee (or permittee)
BMPCT-2757

2. Attach as Exhibit No. **A** a full narrative statement of the circumstances leading to the assignment (or transfer) and the reasons therefor. Fill out Table I to show the disposition of stock (or partnership interests) both before and after the proposed assignment (or transfer). The name, residence, citizenship and office, if any, of each stockholder should also be shown.

3. a. If the assignment (or transfer) is voluntary

1. Attach as Exhibit No. _____ all contracts, agreements or understandings (the substance of oral agreements should be reduced to writing) by which the stock (other interest) is transferred.
2. Attach as Exhibit No. _____ a certified copy of the resolution or other instrument authorizing the assignment (or transfer).

b. If the assignment (or transfer) is involuntary

1. In the case of bankruptcy, or legal disability of the assignor (or transferor), attach as Exhibit No. _____ certified copy of all court orders pertaining to the assignment (or transfer).
2. In case of death of the assignor (or transferor), attach as Exhibit No. **A** The Will or Letters Testamentary and all pertinent court orders.

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4. Attach as Exhibit No. _____ a statement showing the consideration or thing of value, if any, which is to be given for the stock or interest being assigned (or transferred). If the consideration is monetary, this statement should indicate exactly to whom it is being paid, the source of the funds, the terms and conditions of payment, and a balance sheet of the assignee (or transferee) within 90 days of the date of the application must be attached to the statement. If the contract contains a termination date it should be specifically stated.

See Exhibit A

5. Does the assignee (or transferee) propose to continue present program policies and schedules without substantial change? Yes No
 If the answer is "No", attach as Exhibit No. _____ a full statement showing a percentage breakdown in terms of types of programs, a composite week breakdown, a specific statement as to the amount of time to be used for commercial programs and a narrative account of new or proposed program policies. See Exhibit A

Will there be any changes in the staffing of the station? Yes No
 If the answer is "Yes", attach as Exhibit No. _____ a statement giving all changes.

TABLE 1

INSTRUCTIONS: In all cases, the interest held before and after transfer or assignment must be given in terms of percentages. In the case of corporations, the interest must be stated in terms of shares of stock held as well as the percentage equivalent thereof.

Name of stockholder, partner, etc.	Interest held before transfer or assignment	Interest held after transfer or assignment	If a corporation						
			Total shares authorized before and after transfer or assignment		Total shares issued and outstanding before and after transfer or assignment				
			Before	After	Before	After			
H. S. Nakdimen held legal and beneficial title to one of the three shares transferred and beneficial title to two shares. As explained in the application for the construction permit the two shares had been issued for qualifying purposes.									

The applicants waive any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and request consent to assignment of this license or transfer of control over the licensee corporation in accordance with this application. (See Section 304 of the Communications Act of 1934)
 The applicants represent that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.
 All the statements made in this application and attached exhibits are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this application.
 The applicants, or the undersigned on the applicants' behalf, state that they have endeavored to supply full and correct information as to all matters which are relevant to this application and that they have done so as to all matters within their own knowledge.

Dated this 10th day of April, 19 56

H. S. Nakdimen (Deceased)

Name of assignor (or transferor)

By _____

Subscribed and sworn to before me this _____ day of _____, 19 _____

Title

Notary Public

SEAL
 (Notary public's seal must be affixed where the law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires _____

Salome Nakdimen

Name of assignee (or transferee)

By _____

Administratrix

Title

Subscribed and sworn to before me this 10th day of April, 19 56

Notary Public

SEAL
 (Notary public's seal must be affixed where the law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires _____

If legal counsel were employed in the preparation or presentation of this application, give name and mailing address
 For assignor (or transferor) Cohn & Marks

For assignee (or transferee) Capitol Bldg. Washington, D. C.

EXHIBITS furnished as required by this form

Exhibit No.	Para. No. of Form	Name of officer or employee (1) by whom or (2) under whose direction exhibit was prepared (show which)	Official title
A	2, 3 & 4	Salome Nakdimen (2)	Administratrix

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EXHIBIT A

Hiram S. Nakdimen died on December 20, 1955. A certified copy of his will is attached to the application for the transfer of control of KWHN Broadcasting Co., licensee of KWHN, Ft. Smith, Arkansas (BTC-2180). There is attached hereto a certified copy of the appointment of Salome Nakdimen as the sole representative of the estate.

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IN THE SEBASTIAN PROBATE COURT
FORT SMITH DISTRICT

IN THE MATTER OF THE ESTATE OF

H. S. NAKDIMEN, DECEASED

No. 8141

PETITION BY EXECUTOR FOR LEAVE TO RESIGN

Comes now J. H. Friedman, Executor of the Estate of H. S. Nakdimen, deceased, and prays leave of Court to resign as Executor of this Estate. Your Petitioner would show the Court that he has no assets, papers, documents, or other properties of this Estate in his possession, and that all bank accounts belonging to the Estate are in the joint names, requiring joint signatures, of himself and Salome Nakdimen, Administratrix, c. t. a. of this Estate.

Your Petitioner would further show this Court that he was appointed as Executor of this Estate on January 4, 1956, entered upon the performance of his duties, and has performed the same to the best of his judgment and ability from the date of his appointment to the present date. Services to this Estate have consisted of assisting in the taking of the inventory, numerous conferences on matters pertaining to the business and administration of this Estate, attendance at stockholders' and directors' meetings of corporations in which this Estate owns stock, and attendance at this Court when matters pertaining to the Estate were presented to the Court, for which your Petitioner is entitled to a reasonable compensation, which your Petitioner submits is in the amount of \$500.00.

WHEREFORE, your Petitioner prays that this Court grant leave to him to resign as Executor of this Estate, and that his bondsmen be released from any further liability in connection with the affairs of this Estate, and that the Court award as compensation for his services to date the sum of \$500.00.

/s/ J. H. Friedman, Executor

J. H. Friedman, Executor of the
Estate of H. S. Nakdimen, deceased

Subscribed and sworn to before me this 9th day of March, 1956.

(SEAL)

/s/ Edgar E. Bethell

My Commission expires May 3, 1957 NOTARY PUBLIC

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IN THE SEBASTIAN COUNTY PROBATE COURT
FORT SMITH DISTRICT

IN THE MATTER OF THE ESTATE OF

H. S. NAKDIMEN, DECEASED

No. 8141

ORDER AUTHORIZING RESIGNATION OF EXECUTOR

On this 12th day of March, 1956, comes on for consideration the verified petition of J. H. Friedman, heretofore duly appointed and qualified executor of the estate of H. S. Nakdimen, deceased, for leave to resign his position as executor. The court after examining the petition, and being fully advised in the premises, finds that the petition should be granted. It is therefore

ORDERED that J. H. Friedman be, and he hereby is, authorized to resign as an executor of the estate of H. S. Nakdimen, deceased, and the order heretofore entered appointing said J. H. Friedman as an executor of this estate is hereby terminated; it is further ordered Salome Nakdimen is to continue as sole personal representative of said estate until further orders of court, and

ORDERED that effective this date the said J. H. Friedman is relieved of further responsibility to this estate, and his bond heretofore filed in this cause is hereby discharged from further liability, and his bondsmen are hereby released. This Order not having been entered on March 12th, 1956; same is Ordered entered now for then on this 16th day of March, 1956.

/s/ Franklin Wilder
Probate Judge

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LETTERS OF ADMINISTRATION WITH WILL ANNEXED
STATE OF ARKANSAS ss. FORT SMITH DISTRICT
County of Sebastian

To All Persons to Whom These Presents Shall Come, Greeting:

KNOW YE, That the last Will and Testament of H. S. NAKDIMEN of Fort Smith, Arkansas, deceased, hath in due form of law been exhibited, proved and recorded, a copy of which is hereto annexed, and Salome Nakdimen by order of the Probate Court for said County and District has been appointed administratrix with will annexed to, execute the same, and to the end that the property of the Testator may be preserved for those who shall appear to have a legal right of interest therein, and that the said last Will may be executed according to the request of the Testator, we do hereby authorize her the said Salome Nakdimen as such Administratrix to collect and secure all and singular the goods and chattels, rights and credit, which were of the said H. S. Nakdimen at the time of His death, in whosoever hands or possession the same may be found; and to perform and fulfill all such duties as may be enjoined upon her by said Will, so far as there shall be property, and the law charge her and in general to do and perform all other things which now are, or hereafter may be required of her by law.

IN TESTIMONY WHEREOF, I, WYATT WILKERSON, Clerk
of the Probate Court, in and for Said County of Sebastian and
District aforesaid, have hereunto signed my name, and affixed
my official seal, at my office, this 12th day of March, 1956

(SEAL)

/s/ Shirley Speaker Deputy Clerk

CERTIFICATE

STATE OF ARKANSAS)
 County of Sebastian) SS.
 Fort Smith District)

I, WYATT WILKERSON, Clerk of the PROBATE Court, within and for the County and State aforesaid and for Fort Smith District thereof do hereby certify that the annexed and foregoing is a true and full copy of the original Petition by J. H. Friedman, Executor, for Leave to Resign and Order Authorizing Resignation of J. H. Friedman as Executor, Discharging his Bondsmen and Directing that Salome Nakdimen continue as Sole Personal Representative, in the matter of the Estate of H. S. Nakdimen, Deceased; said Order being recorded in my office in Probate Record Book "Y", at Page 253: and

Letters of Administration with Will Annexed issued Salome Nakdimen, Administratrix, March 12th, 1956, in the matter of the Estate of H. S. Nakdimen, Deceased; same being recorded in my office in Executors' Bonds & Letters Record Book "D", at Page 411; said Letters not having been revoked and at this time in full force and effect; and now remaining among the records of said Court in my office at Fort Smith, Arkansas.

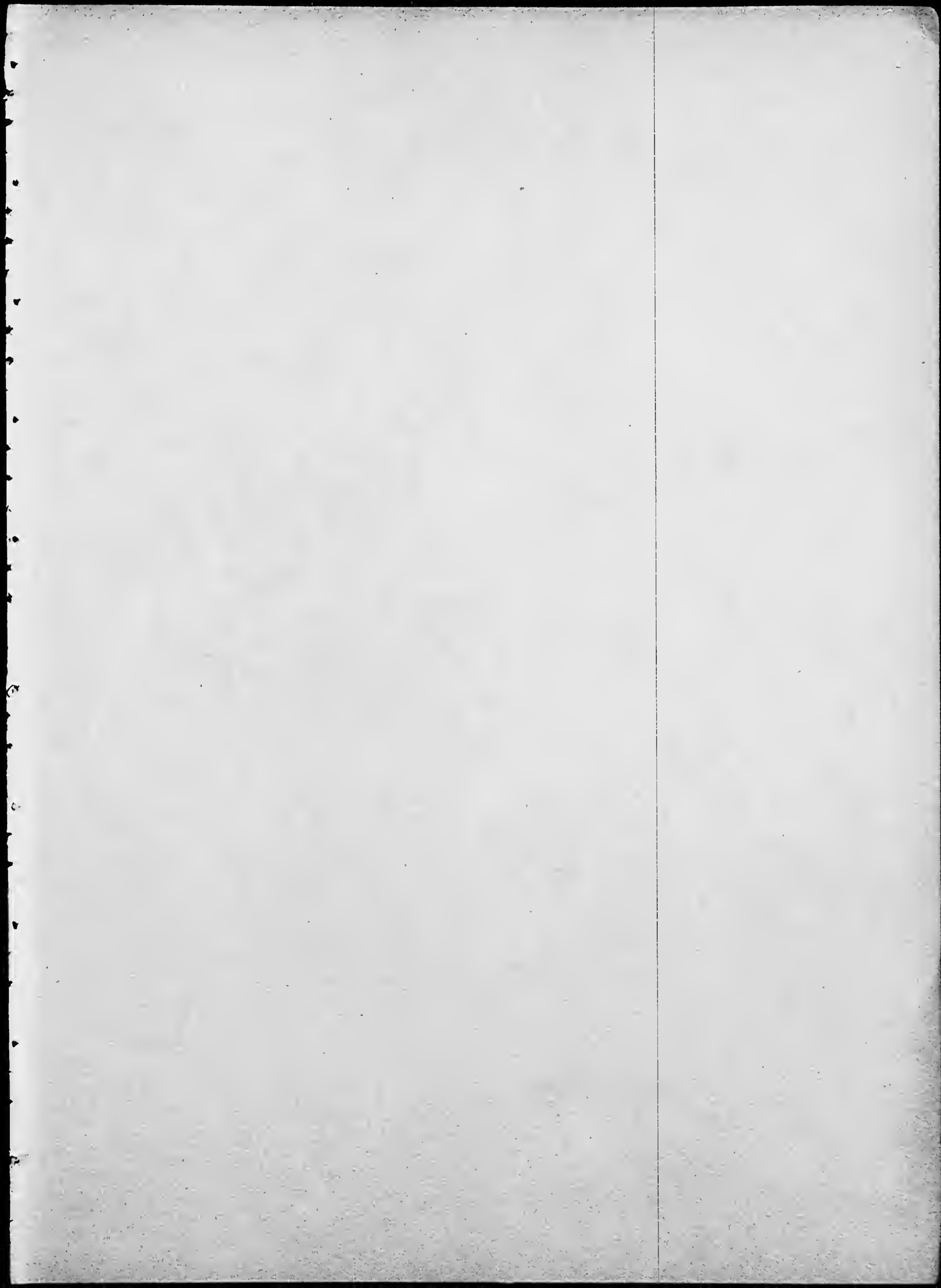
IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Fort Smith, Arkansas, this 29th day of March A. D. 1956.

WYATT WILKERSON

Clerk

By: /s/ Shirley Speaker

Deputy Clerk



BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*States Court of Appeals
For the
District of Columbia Circuit*

OCT 16 1956

No. 13,456

Joseph W. Stewart
CLERK

SOUTHWESTERN PUBLISHING COMPANY,
SOUTHWESTERN RADIO AND TELEVISION COMPANY,
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
AMERICAN TELEVISION COMPANY, INC.,
Intervenor

ON APPEAL FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

ANDREW G. HALEY
J. ROGER WOLLENBERG

1735 DeSales Street, N.W.
Washington 6, D.C.

Attorneys for Appellants

Haley, Doty & Wollenberg
Of Counsel



(i)

No. 13,456

**APPELLANTS' STATEMENT
OF QUESTIONS PRESENTED ***

1. Whether the Commission erred in holding that appellant Southwestern Publishing Company was not a party in interest to the proceedings on Intervenor's applications for extension of construction permit and consent to the involuntary transfer of control of Intervenor at the time when said appellant requested that the record be reopened for the taking of further evidence, and in failing to pass upon the standing of appellant Southwestern Radio and Television Company.

2. Whether the Commission erred in failing to consolidate for hearing the applications by Intervenor for transfer of control and for extension of construction permit in order to resolve the questions raised by appellants with respect to the present qualifications of Intervenor to construct and operate the proposed television station in the public interest.

3. Whether the Commission had before it sufficient facts upon which to make the public interest determinations prerequisite to the grant of Intervenor's applications.

*

This statement was stipulated by the parties, and the stipulation was approved by this Court by Order dated September 6, 1956.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 13,456

**SOUTHWESTERN PUBLISHING COMPANY
SOUTHWESTERN RADIO AND TELEVISION COMPANY,**

Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

AMERICAN TELEVISION COMPANY, INC.,

Intervenor

**ON APPEAL FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION**

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal pursuant to Section 402(b) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. 402(b), from:

(1) a Memorandum Opinion and Order of the Federal Communications Commission in Dockets 11385 and 11386, adopted June 20, 1956 and released June 22, 1956, granting an application of American Television Company, Inc. for extension of construction permit for a new television station (KNAC-TV) at Fort Smith, Arkansas and dismissing an

application for consent to assignment of such construction permit to appellant Southwestern Publishing Company (R. 351-352A);and

(2) an Order, adopted June 26, 1956, released July 3, 1956, granting consent to transfer of control of American Television Company, Inc., permittee of station KNAC-TV from Hiram S. Nakdimen to Salome Nakdimen, Administratrix of the estate of Hiram S. Nakdimen, deceased (R. 353).

Appellants, as the permittee of television station KFSA-TV in Fort Smith, Arkansas, and the corporate parent of the permittee, respectively, have been aggrieved and adversely affected by grant of the application for transfer of control of American Television Company, Inc. and the grant of its application for modification of construction permit to extend its authority to construct a television station which would be in direct competition with station KFSA-TV. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470; Camden Radio, Inc. v. Federal Communications Commission, 94 U. S. App. D. C. 312, 220 F. 2d 191, 195; Granik v. Federal Communications Commission, _____ U. S. App. D. C. _____, 234 F. 2d 682.

STATEMENT OF THE CASE

A. The Parties

Appellant Southwestern Radio and Television Company (hereinafter sometimes called "Southwestern Radio") operates UHF television station KFSA-TV on channel 22 in Fort Smith, Arkansas, pursuant to authorization from the Federal Communications Commission. Appellant Southwestern Publishing Company (hereinafter sometimes called "Southwestern Publishing") owns all of the capital stock of Southwestern Radio. Intervenor American Television Company, Inc. (hereinafter

sometimes called "American") holds a construction permit from the Federal Communications Commission which authorizes it to construct a VHF television station on channel 5 in Fort Smith (R. 27¹).

B. The Background of the Controversy

The construction permit for channel 5 was originally issued to American in June, 1954. In December, 1954 Southwestern Publishing and American reached the conclusion that the Fort Smith area would not support two television stations. They filed a joint application with the Federal Communications Commission for consent to assignment of the construction permit for channel 5 to Southwestern Publishing (R. 1-51). The Commission was advised that, in the event of a grant of this application, Southwestern Radio would surrender its existing authorization for UHF channel 22 as soon as the VHF station on channel 5 should be constructed and commence operation (R. 36). Thus, in substance, the assignment application looked toward modification of television facilities in the Fort Smith area by a shift from UHF channel 22 (now operated by Southwestern Radio, the subsidiary) to VHF channel 5 (to be operated by Southwestern Publishing, the parent corporation). Contemporaneously with the filing of the assignment application, American applied for modification of its construction permit to extend the expiration date thereof, since the permit was at that time due to expire on February 3, 1955 (R. 356-377).

In February, 1955 the Commission addressed a letter to the applicants (American and Southwestern Publishing) raising various

¹ Pursuant to a stipulation among the parties which was approved in an Order issued by this Court on September 6, 1956, record references in this brief will be directed to the original record only. In conformity with the pagination used in such record, references will be made to the transcript of hearing (Tr.) and the remainder of the record (R.) The Joint Appendix will be so paginated as to facilitate locating record citations.

questions with respect both to American's application for extension of construction permit and to the joint application for consent to assignment of the construction permit to Southwestern (R. 83). After considering the replies of the applicants (R. 85, 95), the Commission, in March, 1955, designated both applications for consolidated hearing on the following issues (R. 96, 96A):

1. To determine whether, in light of the consideration to be received by American Television Company, Inc., H. S. Nakdimen and George T. Hernreich from Southwestern Publishing Company for the assignment of the permit for Station KNAC-TV and the agreement of said individuals not to reenter the broadcasting field, the above-entitled applications involve "trafficking" in a construction permit, contrary to the public interest.²
2. To determine whether, on the basis of the evidence adduced with respect to Issue 1 above, a grant of the above-entitled applications would serve the public interest, convenience and necessity.

Thereafter, an evidentiary hearing was held before a hearing examiner (Tr. 1-132, R. 111-119), and in October, 1955 the examiner issued an initial decision looking toward grant of both the assignment application and the extension application (R. 161-165A). The examiner found that no trafficking had been involved, and that grant of the applications would serve the public interest, convenience, and necessity (R. 165A). Exceptions to the initial decision were filed by the Commission's Broadcast Bureau (R. 166-170), and a joint reply to the exceptions was filed by American and Southwestern (R. 185-203). Oral argument on the Broadcast Bureau's exceptions was requested by American and Southwestern (R. 186), but this request was later withdrawn and oral argument

² The contract provided for the payment of \$50,000 to American in reimbursement of the expenses of its principals in obtaining a construction permit and preparing for television operation (R. 27-31). In addition, covenants not to compete were executed with two individuals connected with the proposed assignor (Messrs. Nakdimen and Hernreich), pursuant to which each was to receive \$5,000 per year for a period of seven years (R. 32, 34).

was waived in the interest of securing more expeditious final action by the Commission (R. 209).

In March, 1956 the Commission received a petition opposing grant of the assignment application from a group of individuals styling themselves as "Citizens Group For Two Television Stations in Fort Smith" (R. 231-261). No petition to intervene was filed by this group, but it nevertheless requested that the record be reopened to adduce further evidence; in the alternative, it was requested that the Commission hold an oral argument to consider the qualifications of Southwestern Publishing, the proposed assignee (R. 251-252). In response to the Citizens Group's petition, an oral argument on the questions raised by the Petition was held on March 20, 1956 before the Commission en banc (Tr. 133-196), with counsel for the Citizens Group participating (Tr. 136-147).

The original contract for assignment of the channel 5 construction permit to Southwestern Publishing had an expiration date of February 1, 1955, unless extended by the parties, or unless approval of the Federal Communications Commission should be secured prior to that date (R. 30). Several extensions of this contract were agreed to by the parties, the last of which provided an expiration date of April 1, 1956 (R. 352). American and George T. Hernreich (who is an optionee of a 50% interest in American, and who was a party to the assignment contract) declined to extend the contract beyond that date (R. 302). When the Commission failed to render a final decision on the assignment application by April 1, 1956, the contract lapsed.

On April 10, 1956 Southwestern Publishing filed with the Commission a detailed petition seeking to have the initial decision set aside and the record reopened for the taking of evidence with respect to the present qualifications of American to construct and operate a television

station (R. 287-300). It pointed out that as a result of the lapse of the assignment agreement circumstances had radically changed, so that the question before the Commission was no longer whether the public interest would be served by operation of a television station on Channel 5 by Southwestern Publishing. Since the assignment contract had lapsed, the question presented at that juncture was whether American was presently qualified to build and operate the station (R. 287-290).

It was alleged in the petition that there had been significant changes in American which cast serious doubt upon its present qualifications to construct and operate a television station in the public interest. Thus, when the original construction permit was granted it was contemplated that Hiram S. Nakdimen, an experienced broadcaster, would act as General Manager of the station for the first five years, and the financing of the station depended in large part upon Mr. Nakdimen's resources. During the pendency of the proceedings on the assignment and extension applications, however, Mr. Nakdimen, sole beneficial owner of American, had died. Thus the applicant had been deprived of its only experienced broadcaster and its principal source of financial support. (R. 287-289.)

The petition further alleged that the Commission did not have before it sufficient facts with respect to the intentions and capabilities of the Nakdimen estate to proceed with the construction and operation of the station. The Commission did not have before it facts as to the value of the estate, or the ability or legal authority of the estate to borrow funds to finance construction of the proposed station. A copy of Mr. Nakdimen's last will and testament was attached to the petition as an exhibit (R. 294-300). The will did not direct or empower the estate or its beneficiaries to carry out Mr. Nakdimen's personal financial commitments with respect to American. And the will did not confer upon the testamentary trustees or executors the power to borrow

money to finance the construction of a television station (ibid.; and see R. 290-291).

Southwestern Publishing's petition contained additional allegations with respect to the uncertainty of the present composition, capabilities and intentions of American. Thus, it was alleged that it could not be ascertained with certainty who would administer Mr. Nakdimen's estate (R. 290-291). The executors named in the will (who were also designated as testamentary trustees of trusts created thereunder) had all been removed by court order or had resigned (R. 291). Finally, the status of American was alleged to be uncertain by reason of the fact that Mr. George Hernreich held an option to acquire a 50% interest in the station but had not exercised the option, and that he had not demonstrated any present ability to buy the interest of the Nakdimen estate, or to build the station himself, although he had indicated a willingness to do so (ibid.).³

Southwestern Publishing specifically requested in its petition that the Commission reopen the record in the assignment and extension proceedings (which contained no evidence on the above matters) and that it consolidate for hearing in that proceeding any application which might be filed for transfer of control of American from Mr. Nakdimen (deceased) to his successors in interest (R. 292). Southwestern Publishing advised the Commission that if the application for extension of construction permit should be denied, and channel 5 thrown open for application by qualified persons, Southwestern Publishing would promptly file an application for the channel (R. 291A-292).

³ As was more fully developed in a later pleading filed by appellants (R. 333-334, 339-341), it is not clear that Mr. Hernreich has any binding obligation with respect to the financing of American, and it does not appear that the agreement between Hiram S. Nakdimen and Mr. Hernreich governing Mr. Hernreich's participation in the affairs of American was ever fully implemented. As a result, Mr. Hernreich's prospective role in American, if any, is shrouded in uncertainty (R. 339-340).

On the same day that the above described petition was filed, American filed an application for consent to transfer of control of American to Salome Nakdimen, as administratrix of the estate of Hiram S. Nakdimen, and a petition for dismissal of the assignment application and immediate grant of the application for extension of construction permit (R. 302-304).

Oppositions and replies to the respective petitions were thereafter filed by the parties.⁴ Southwestern Radio joined as a signatory to each of the subsequent pleadings filed by Southwestern Publishing (R. 325, 332), and each of these pleadings reiterated or incorporated the requests for relief contained in the original petition (R. 328-329, 343).

In none of the pleadings filed by American was the Commission supplied with sufficient facts to enable it to resolve the detailed questions raised in the pleadings filed by appellants. American relied essentially on broad allegations to the effect that its plans had not changed; it pointedly declined to submit further information unless such information should be required by the Commission to be furnished. Thus in one of its pleadings it argued as follows (R. 347-348):

4. American [sic] argues that the Commission has before it "practically no information as to the plans, capabilities or resources of the Nakdimen Estate." This is not true. The applicant has stated, in the application for the involuntary transfer of control that the American plans have not changed nor will they change by the grant of the application. As far as the "resources" of the Estate are concerned, it is evident from the Will

⁴ The pleadings were as follows: Opposition of American Television Company, filed April 27, 1956, to petition of Southwestern Publishing (R. 310-315). Opposition of Broadcast Bureau of Federal Communications Commission, filed April 27, 1956, to petition of Southwestern Publishing (R. 316-323). Response of Southwestern Publishing and Southwestern Radio, filed April 27, 1956, to petition of American (R. 325-330). Reply of Southwestern Publishing and Southwestern Radio, filed May 1, 1956, to oppositions of American and Broadcast Bureau to petition of Southwestern Publishing (R. 332-344). Reply of American, filed May 1, 1956, to opposition of Southwestern Publishing and Southwestern Radio to petition of American (R. 346-348). The subsequent pleadings filed by appellants further documented the existence of grave uncertainties as to the present qualifications of American (e.g., R. 332-344).

of H. S. Nakdimen that all of his assets have been transferred to the Estate and (with one very minor exception) all of the assets may be used by the Executrix as prudent business judgment dictates. [Emphasis added.]

5. It is to be borne in mind that the application for extension of completion date does not involve comparative considerations. As long as the Executrix satisfies the Communications Act's requirements, the Commission has the power to make the grant although, of course, if the Commission desires further information concerning the Executrix, it also has the power to request such information. The Commission should not designate for further hearing the application merely because a disgruntled and disappointed proposed assignee -- without alleging any facts adverse to the Executrix -- pleads that it desires to acquire, for its own use, the construction permit. [Emphasis added.]

It does not appear that the Commission ever sought or received further information from American. In consequence, the Commission had before it no actual information as to whether American could finance the construction of its proposed station, or how such financing would be provided. And the Commission had before it no information as to who would actually operate the proposed station if it should be constructed, or who would be the directors of American if Mr. HERNREICH should ever exercise his 50% option.

C. The Commission's Decisions

On June 22, 1956 the Commission released (one Commissioner dissenting and one Commissioner not participating) a brief Memorandum Opinion and Order in which (1) the application for consent to assignment of the construction permit for channel 5 to Southwestern Publishing was dismissed, (2) American's application for extension of construction permit was granted, and (3) Southwestern Publishing Company's petition to reopen the record was denied (R. 351-352A).

A somewhat detailed consideration of this Opinion is necessary to a resolution of the questions raised on the present appeals.

The Commission approved the hearing examiner's finding that no trafficking was involved in the proposed assignment of the construction permit for channel 5 to Southwestern Publishing but concluded that the application for consent to the assignment had become moot as a result of the expiration of the assignment agreement (R. 352). This left for consideration the application for extension of construction permit and application for transfer of control to which appellants' pleadings, described above, had been particularly addressed. The Commission found it unnecessary to consider or pass upon the questions raised by appellants with respect to the present qualifications of American. It found that the pleadings raising those questions "are moot by virtue of the expiration of the assignment contract and accordingly they must be denied" (R. 352). The Commission also ruled that Southwestern Publishing "had no standing as a party in interest when it filed its April 10 pleading*** and subsequent pleadings and should not now be permitted to extend the existing hearing record through additional evidence on entirely different matters" (ibid.). It failed to rule with respect to the standing of Southwestern Radio. It failed to comment upon appellants' request that American's transfer of control application be consolidated for hearing with the extension application.

While declining to consider the public interest factors explicitly called to its attention by appellants, the Commission nevertheless made the requisite statutory finding that "the public interest, convenience and necessity will be served" by a grant of the extension application (ibid.). And it extended American's construction permit for the "standard time initially given applicants within which to construct the station" (R. 352A) (i. e., eight months ⁵).

⁵

Section 3.626 of the Commission's Rules and Regulations, 1 Pike & Fischer R. R. 53:635.

On July 3, 1956, the Commission announced, without opinion or explanation, that on June 26, 1956 it had granted the application of American for transfer of control of the permittee corporation from Hiram S. Nakdimen to Salome Nakdimen, administratrix of the estate of Hiram S. Nakdimen, deceased (R. 354). Again, no reference was made by the Commission to the fact that appellants had raised substantial questions with respect to this application and had requested that it be designated for hearing in consolidation with the proceedings on the extension application (R. 293, 326-329, 341-342).

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, are set forth in an Appendix, infra pp. 29-30.

STATEMENT OF POINTS

1. The Commission erred in granting American's applications without considering pertinent public interest questions affecting American's qualifications as a television permittee.

A. The questions raised were substantial and were never adequately answered.

B. The questions raised were not moot, as erroneously ruled by the Commission.

C. Appellants had standing to be heard as parties in interest who would be economically injured by grant of American's applications, and Southwestern Publishing also had standing as a party to the hearing on the extension application.

SUMMARY OF ARGUMENT

The Commission erred in declining to consider the serious and substantial public interest questions raised by appellants concerning American's present qualifications as a television permittee. The Commission's findings (explicit or tacit) that the public interest, convenience and necessity would be served by grant of American's applications cannot be sustained in the absence of findings on the crucial matters deliberately disregarded by the Commission.

A. The questions were substantial.

Facts alleged by Southwestern, and not controverted, showed that there was complete uncertainty as to the composition and future control of American, the personnel who would operate the proposed station, the method of financing of the proposed station, the legal authority and financial ability of the Nakdimen estate with respect to investment in American, and the role, if any, to be played by Mr. Hernreich in the station.

B. The questions were not moot.

The issues with respect to American's qualifications to construct and operate a television station were not rendered moot, as the Commission thought, by the expiration of the contract for assignment of American's construction permit. On the contrary, when that contract expired, and American was forced to rely upon its own resources to build the station, its present qualifications became critical.

C. Appellants had standing.

The Commission's ruling that Southwestern Publishing lacked standing to file its petition of April 10, 1956 to reopen the record, and subsequent pleadings, was patently erroneous. As a party to the hearing ordered by the Commission on the application for extension of construction permit, Southwestern Publishing had standing to raise questions at any time until that hearing was terminated. Both appellants had independent standing by reason of the economic effects upon station KFSA-TV (owned by Southwestern Radio and indirectly owned by Southwestern Publishing) of grant of American's applications. The Commission also erred in failing to pass upon Southwestern Radio's standing, since Southwestern Radio had joined in requesting the relief sought by Southwestern Publishing.

ARGUMENT

THE COMMISSION ERRED IN DECLINING TO
CONSIDER THE PUBLIC INTEREST QUESTIONS
RAISED BY APPELLANTS WITH RESPECT TO
AMERICAN'S QUALIFICATIONS AS A TELEVI-
SION PERMITTEE

A. Appellants Raised Substantial Questions
With Respect to American's Present
Qualifications.

Analysis of the opposing pleadings filed by the parties before the Commission (supra, pp. 5 - 9) makes clear that appellants raised significant questions concerning the control of American and the ability of the applicant to construct and operate a television station in the public interest. It is equally clear that the questions raised by appellants were never satisfactorily answered by American. Among the significant questions left unresolved on the pleadings were the following:

1. Who will actually operate the proposed station?

With the death of Mr. Nakdimen, owner of American and the only experienced broadcaster connected with the permittee, de facto⁶ control of the applicant passed to the control of the Nakdimen estate (R. 289). No information was furnished by American as to its staffing plans either in its belated application for involuntary transfer of control (R. 402-408) or in its pleading in opposition (R. 310-315) to the Southwestern Publishing petition of April 10, 1956, in which the matter was called to the Commission's attention (R. 287, 289).

⁶ No application for transfer of control of American pursuant to Section 310(b) of the Communications Act (*infra*, p. 30) was filed at the time of Mr. Nakdimen's death on December 20, 1955, and none had been filed prior to the filing of Southwestern Publishing's petition to reopen the record on April 10, 1956. On that date, American filed its application for consent to transfer of control from Mr. Nakdimen to Salome Nakdimen as administratrix of his estate (R. 402-408).

2. Who has controlled American since the death of Mr. Nakdimen?

It would appear from the papers filed by American that since Mr. Nakdimen's death on December 20, 1955 several involuntary transfers of control of its construction permit may have occurred. Mr. Nakdimen's will named three executors (R. 295), one of whom was Mr. J. H. Friedman. On Mr. Nakdimen's death, control of the permittee presumably passed initially to all three executors. However, it appears that only Mr. Friedman ever qualified as executor, so he presumably acquired sole control on January 4, 1956.

At some point not quite clear, Mrs. Salome Nakdimen entered the picture as administratrix, with the will annexed, of Mr. Nakdimen's estate. A letter to the Commission, dated February 25, 1956, was signed by both Mrs. Nakdimen as administratrix and Mr. Friedman as executor. At this point they may have controlled the permittee jointly. But Mrs. Nakdimen apparently did not obtain formal letters testamentary until March 12, 1956 (R. 405-407). In any event, at some point on or prior to March 12, 1956 Mrs. Nakdimen became sole personal representative of the estate, and thereby acquired control.

Thus the application for involuntary transfer of control from Nakdimen to Mrs. Nakdimen contained insufficient information to justify the conclusion that control actually passed directly from Mr. Nakdimen to Mrs. Nakdimen, as administratrix and therefore it appears that additional applications for Commission consent to any intermediate transfers should have been required. Certainly the transfer of control application should not have been granted without determining all of the facts.

No help in this connection was furnished by American. American's only statement on the subject was demonstrably erroneous. American argued (R. 312):

(a) Petitioner states that "we are advised that the executors named in the Will (who are also named as trustees) have all been removed by Court Order or have resigned". This is a false statement and Petitioner could have ascertained the facts by examining the Court records. There is attached to the application for the involuntary transfer of control of KNAC-TV (BTC-2211), which was filed on April 10, 1956 a certified copy of the Court's Order designating Salome Nakdimen as sole Executrix of the Estate. (She and two other Executors were the original appointees and the Court subsequently removed the two others.)

(b) The Petition states that "an additional element of uncertainty is introduced by reason of the fact that it cannot now be known who will serve as trustees of the trusts created under Mr. Nakdimen's Will". Petitioner offers no evidence, argument or citation to support this cavalier statement. An examination of the trust instrument and the Court records would clearly demonstrate who these people are.

As appellants pointed out in reply (R. 336 - 337):

It [American] flatly asserts that our statement about the removal and resignation of the directors was a "false statement" and that "Petitioner could have ascertained the facts by examining the Court records" (American Tel. Opp. 3). The facts, however, support our statement, not that of American Television. It is regrettable that they have to be gleaned from Court records instead of from disclosures to the Commission which American Television should have made.

The Will of Mr. Nakdimen named but three executors:

J. H. Friedman

M. Bershof

Alfred Aaronson

(Ex. A to Petition of Southwestern, p. 6). Contrary to the unsupported assertion of American Television (Opp. 3), Mrs. Nakdimen was not one of the "original appointees" under the Will. Indeed she is not now, and never has been

an executrix of the estate. After Executors Aaronson and Bershof were removed (p. 3, supra) she was named co-administratrix with the will annexed along with Executor Friedman. Since March 12, 1956, she has held a Court appointment as sole administratrix with the Will annexed. The exhibit to American Television's recent application for involuntary transfer of control contains a copy of the resignation of the third executor, Mr. Friedman.

Thus the facts are as petitioner stated them, and American Television's intemperate accusation of falsity has returned to roost. But the critical fact is not that American Television has made reckless accusations based upon misconstruction of the facts. The critical fact is that the Commission does not have before it any method of ascertaining who will actually control the Nakdimen estate once administration is completed and the testamentary trusts are established. As noted, it seems highly improbable that the trustees named in the Will actually will serve as such. And even assuming that the named trustees will be permitted to and will serve (as American Television seems to imply but does not affirmatively state (Opp. p. 3)), the Commission has no evidence of their attitudes, intentions or capabilities with respect to operation of a television station.* [Emphasis added.]

*

One of the three, Mr. Friedman, did sign American Television's letter of February 25, 1956 to the Commission, but that was in his capacity as executor not trustee. And almost immediately thereafter he resigned as executor.

The critical lack of information to which appellants referred above was never supplied.

3. Who will be the directors of American when it actually operates a television station?

Southwestern Publishing pointed out to the Commission the following (R. 291):

Uncertainty with respect to the ownership of American Television Company, Inc. is also created by the fact that while the permittee was owned by Mr. Nakdimen, Mr. George Hernreich has held an option for a 50% interest in the company since the original grant of construction permit. Mr. Hernreich has advised the Commission that he intends to exercise his option and that he may buy out the estate and build the station. * But he has not offered any evidence of his financial ability to do so. Nor has he made any showing that the estate is willing to sell out to him. On the contrary, the estate has advised the Commission that it had no intention of selling out its interest to Mr. Hernreich.** Thus in the present state of the record the Commission does not really know who will ultimately construct and operate the station or whether the persons who will do so are financially, technically or otherwise qualified.

* See Petition filed by George T. Hernreich herein on February 25, 1956.

** See letter of February 25, 1956 to the Commission from Salome Nakdimen and others.

Appellants also called attention to the fact that the original agreement between Messrs. Hernreich and Nakdimen contemplated that Mr. Hernreich would buy into American, and that when he did so, the board of directors would be increased from three to seven, and that four new members -- a majority -- would be added to the board. The Commission was not advised who these new directors would be, or what qualifications they would have, if any (R. 338).

4. How will construction of the proposed station be financed?

Appellants pointed out in detail that the financing of American's proposed television station had been rendered completely uncertain

as a result of Mr. Nakdimen's death. He was sole beneficial owner, and the size of his estate, the legal power of the estate to obtain or expend necessary funds, and the identity of the persons who would eventually administer his estate were uncertain, to say the least (R. 289-291, 326-328, 338-340). Specific, detailed and substantial questions as to the construction of the Nakdimen-Hernreich agreement and the Nakdimen will, as well as to the application of Arkansas probate law in the circumstances presented, were raised by appellants (R. 289-291, 337-340). It was demonstrated that the Commission had before it neither a satisfactory showing that the estate or Mr. Hernreich was legally bound to finance construction of the station, nor a satisfactory showing that the estate or Mr. Hernreich was financially able to do so. And it was highly doubtful that the estate would be legally empowered to provide such financing (ibid.)

It requires no citation of authority to establish that financial qualifications and plans of an applicant, the identity and qualifications of its principals, the nature of its staffing plans, and the other matters discussed above are normally of vital concern to the Commission in reaching an over-all judgment as to whether an applicant's proposal will operate in the public interest. The Commission did not here find that these questions were unimportant. It simply refused to consider them at all because of their alleged mootness, and because Southwestern Publishing was thought to lack standing to raise them (supra, p. 10). It will be demonstrated in Points B and C, infra, that the questions were not moot, and that appellants had standing.

B. The Questions Raised as to American's Qualifications Were Not Moot

In ruling moot the various pleadings filed by the parties after April 1, 1956 with respect to American's present qualifications (supra p. 10) the Commission appears to have misunderstood the factual situation presented, or to have misapplied the applicable law, or both.

Prior to April 1, 1956, the Commission essentially had only one problem to decide on the issues framed by it. The question presented was whether, in all the circumstances, the consideration proposed to be paid to American and its principals in connection with the proposed assignment of the construction permit for channel 5 was such as to establish "trafficking" in the permit in a manner contrary to the public interest.⁷ After April 1, 1956, the Commission was confronted with a wholly different problem. Since the proposed assignment had been defeated by the passage of time, and the refusal of certain parties to the assignment contract to extend it, the Commission was required to decide whether the public interest would be served by renewing American's construction permit for an additional period. To resolve this question properly, the Commission would have been compelled to consider American's present qualifications, not the qualifications it had when its permit was first issued in 1954, nearly two years previously. This the Commission refused to do (supra p. 6).

Had the significant changes with respect to American not been brought to the Commission's attention, there might have been some justification for their being overlooked by the Commission. The Commission conceivably might have assumed continuing existence of the conditions obtaining at the time of its original grant to American. But the fact is that

⁷ This question was ultimately answered in the negative, although not until after the question had been mooted by the expiration of the assignment contract (supra, p. 10).

highly pertinent information was forcefully brought to the Commission's attention by appellants, yet the Commission chose to dispose of the pleadings containing the information as "moot." (R. 352).

Why was this information moot? The Commission indicates (R. 352) that it was moot because the proposed assignment to Southwestern was moot. But it was the very mootness of the proposed assignment which made critical questions as to the qualifications of American to construct and operate its proposed station on channel 5. So long as American was proposing to assign its construction permit to Southwestern Publishing, the death of Mr. Nakdimen and the ensuing uncertainties as to American's ability to construct and operate the station were of little or no significance (except perhaps to militate in favor of approval of the assignment of the permit to Southwestern Publishing). When the assignment proposal was abandoned, however, the qualifications of American at that time became all important. It was reversible error to refuse to consider them.

The applications here involved could not lawfully be granted without prerequisite statutory findings that the public interest would be served thereby (Communications Act, Sections 308 (a), 309, 310 (b), infra pp. 29, 30). And it has been established by repeated decisions of this Court that an administrative agency has a continuing duty to consider factors affecting the public interest which arise during the period when a matter is within the Agency's jurisdiction, or even when pending on appeal. The Enterprise Company v. Federal Communications Commission, 97 U.S. App. D.C. 374, 231 F.2d 708, cert. den. 351 U.S. 920; Fleming v. Federal Communications Commission, 96 U.S. App. D.C. 223, 225 F.2d 523; Butterfield Theatres, Inc. v. Federal Communications Commission (Case No. 12527, decided May 24, 1956, Slip Op. p. 3, note 5); City of Pittsburgh v. Federal Power Commission

(Case No. 12895, decided March 8, 1956, Slip Op. p. 15, note 33); Southland Television Company v. Federal Communications Commission (Case No. 13021, decided October 2, 1956). In the present case the Commission has proceeded in disregard of this principle of law by refusing to consider pertinent facts which both arose and were explicitly called to its attention prior to grant of the applications involved.

C. Appellants Had Standing

Apparently the Commission's refusal to look at American's present qualifications flowed, at least in part, from the Commission's ruling that Southwestern Publishing lacked standing to raise them (R. 352).

The Commission's ruling was plainly erroneous. Southwestern Publishing was a party to the hearing on American's application for extension of construction permit (Docket No. 11385), and its participation therein was not limited in any manner by the order designating the hearing. As such a party, Southwestern Publishing was certainly entitled to participate fully in the proceedings on the extension application. At the time that Southwestern Publishing filed its petition of April 10, 1956 to reopen the record (R. 287-300), it was still a party to the proceedings and neither the Commission nor any party to the proceeding had moved to terminate Southwestern Publishing's status as such.

It is true that on April 1, 1956 an event occurred which radically affected both the proceedings before the Commission and Southwestern Publishing's interest therein. On that date the assignment contract lapsed. That event may have altered Southwestern Publishing's stake in the proceeding but it did not destroy it. For Southwestern Publishing is the corporate parent of Southwestern Radio, the permittee of UHF television station KFSA-TV in Fort Smith, Arkansas. Had the assignment application been approved in timely fashion, the facilities of

KFSA-TV (to the extent feasible) would have been utilized on VHF channel 5 by Southwestern Publishing (R. 36), and the present UHF operation would have ceased. As a result of the lapse of the assignment contract, however, station KFSA-TV (indirectly owned by Southwestern Publishing) will be directly in competition with any station built on channel 5 by American.

Southwestern Publishing, as the owner of all of the stock of the permittee of KFSA-TV, has an obvious economic interest in any application to extend American's construction permit (Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470; Camden Radio, Inc. v. Federal Communications Commission, 94 U.S. App. D.C. 312, 220 F.2d 191, 195), in addition to its interest as a proposed applicant for channel 5 in the event American's permit is not renewed (R. 293). Yet the Commission ruled that it had no standing.

Some light may be thrown on the Commission's approach to this problem by the fact that it specifically stated its agreement with the contentions of the Commission's Broadcast Bureau with respect to the standing question (R. 352). The Bureau had argued as follows (R. 320):

9. It will be observed that Southwestern is requesting the Commission to engraft upon a moot proceeding a new application, and matters to be considered in connection therewith, which have no relationship whatsoever with the issue involved in the above-entitled proceeding, and to extend the existing academic hearing record through additional evidence on entirely different matters. Southwestern also desires to participate in the proceeding although it is not (at least not now) a party in interest with respect to the above referred to application for involuntary transfer of control.

10. Southwestern had standing in this proceeding originally because it was a co-applicant for approval of the assignment of the construction permit of American Television Company, Inc. In our view, Southwestern lost such status when the assignment application was rendered moot by the expiration of the agreement of assignment, which occurred on April 1, 1956. Accordingly, Southwestern had no standing in this proceeding on April 10, 1956, when it filed the instant petition. The petition contains no facts which would reasonably justify affording the petitioner the relief it seeks. Reference to the matters which Southwestern urges be set for hearing show that Southwestern is merely anticipating the matters which the Commission would, without "prompting" by Southwestern Review in the course of its consideration of the application for involuntary transfer of control.

It appears from the above argument that the Bureau evidently thought (for reasons which it failed to articulate) that the issues raised by appellants were relevant only in connection with the then pending application for transfer of control of American from Hiram S. Nakdimen, deceased, to his administratrix. And the Bureau apparently felt that it was presumptuous for appellants to call matters to the Commission's attention which, the Bureau was confident, the Commission would review in connection with the transfer without appellants' "prompting" (R. 320).

It may be agreed that the application for transfer of control to the administratrix and the extension application were related. Indeed, appellants unsuccessfully sought to have them consolidated for hearing (supra, pp. 7, 10 - 11). But the interrelation of the two applications would not justify a grant of either without sufficient facts upon which to base a requisite statutory public interest determination. Moreover, despite the Bureau's vigorous assertion that the questions raised by appellants would be considered in connection with the transfer of control application, there is no indication that such consideration was in fact given.

When the Commission came to consider the transfer of control application, it granted the application without hearing, without opinion, and without explanation (supra, p. 11). If it reviewed or considered the matters raised by appellants in connection with that application, this record does not reveal that fact.⁸ The record fails to indicate that the Commission had before it any more positive information as to American's qualifications on June 26, 1956, when the transfer of control application was granted, than it did on June 20, 1956 when it granted the extension application.

In an effort to defend its unrealistic ruling on standing, the Commission may argue that Southwestern Publishing cannot assert a competitor's interest in the American extension application because Southwestern Publishing's ownership of Station KFSA-TV is indirect. Such an argument would be of dubious validity in light of Granik v. Federal Communications Commission, ___ U.S. App. D. C. ___, 234 F.2d 682, recognizing the standing of one who had a mere claim of a contractual interest in a licensee. In any event, the argument would be of no avail here because Southwestern Radio, the legal permittee of the Fort Smith UHF station, formally joined Southwestern Publishing in requesting the relief denied by the Commission (supra, p. 8). The Commission did not hold that Southwestern Radio lacked standing; indeed, it ignored the fact that Southwestern Radio had joined in the pleadings before it.

It is quite evident that the Commission capriciously rejected the pleadings before it on the standing ground to avoid considering public interest questions—questions which it should have been assiduous to

⁸ As the public notice announcing the grant indicates that the actual grant was made by the Chief of the Broadcast Bureau, by delegation, there is no evidence of record that the Commission itself even considered the application (R. 353-354A).

consider no matter by whom raised. Clarksburg v. Federal Communications Commission, 96 U.S. App. D.C. 211, 225 F.2d 511. It is significant that in this very case the Commission had held an oral argument on questions raised by the Citizens Group for Two Television Stations although that group was never a party to the proceeding, and was never found by the Commission to have standing as such (supra, p. 5).

And in the course of a colloquy during that oral argument, the Chairman of the Commission clearly indicated the view that the Commission must always consider new facts bearing on the public interest (or even old facts of which the Commission was not previously aware) no matter by whom raised, so that the Commission can reach an informed decision in the public interest (Tr. 182-185).⁹ We find it hard to comprehend why the assiduous concern with the public interest manifested in connection with the petition of the Citizens Group was abandoned in the case of appellants' pleadings.

It may be contended by the Commission before this Court that it really did consider appellants' contentions and rejected them for good and sufficient reasons, now to be supplied. But, it is settled law that the Commission must include within the four corners of its decision an explanation of its rulings which will make possible intelligent judicial review. That the Commission has failed to do, and its decisions must be reversed. Telanserphone, Inc. v. Federal Communications Commission, 97 U.S. App. D.C. 398, 231 F.2d 725.¹⁰

⁹ Commission decisions have repeatedly stated that even where a petitioner does not show that it is a party in interest, "the Commission in this case as well as in all other instances, will consider any facts brought to its attention which bear on the question of whether its 'grant was improperly made or would otherwise not be in the public interest.'" United Broadcasting Co. (KEEN), 13 Pike & Fischer R.R. 1309, 1313-1314 (emphasis added); Aldo de Dominicus, 14 Pike & Fischer R.R. 76, 79; KRGV Television, Inc., 13 Pike & Fischer R.R. 1205; Ian S. Landsdown, 13 Pike & Fischer R.R. 488, 491.

¹⁰ See also Capital Transit Co. v. Public Utilities Commission, 93 U.S. App. D.C. 194, 201, 213 F.2d 176, 183, cert. den. 348 U.S. 816; American Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 343, 350-351, 179 F.2d 437, 444-445; Heitmeyer v. Federal Communications Commission, 68 U.S. App. D.C. 180, 186, 95 F.2d 91, 97; Tri State Broadcasting Co. v. Federal Communications Commission, 68 App. D.C. 292, 96 F.2d 564; Vendemia v. Cristaldi, 95 U.S. App. D.C. 230, 221 F.2d 103; Democrat Printing Co. v. Federal Communications Commission, 91 U.S. App. D.C. 72, 202 F.2d 298.

CONCLUSION

For the foregoing reasons, the decisions and orders of the Federal Communications Commission here under appeal should be reversed, and the case should be remanded with directions that the Commission hold a consolidated hearing on the applications of American Television Company, Inc., for extension of construction permit and transfer of control to determine whether the public interest, convenience and necessity would be served by grants thereof, and directing that appellants be made parties thereto. There should be such other and further relief as the Court may deem proper.

Respectfully submitted,

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October 16, 1956.



APPENDIX

The Communications Act of 1934, as amended, 47 U.S.C. 1 et seq. provides in pertinent part as follows:

Section 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it * * *

* * * * *

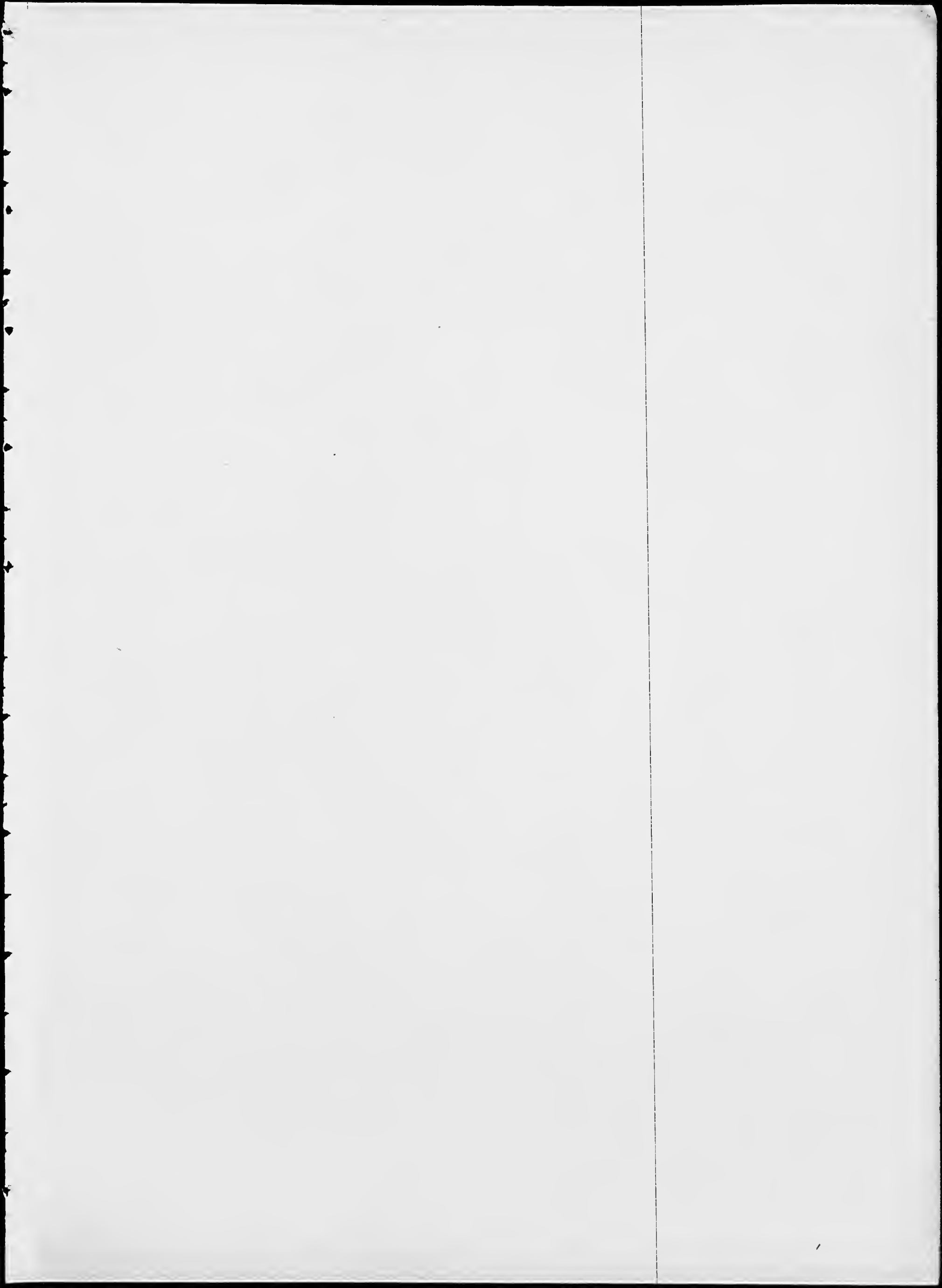
Section 309. (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefore,

specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

* * * * *

Section 310. (b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.



BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,456

FILED DEC 10 1956

SOUTHWESTERN PUBLISHING COMPANY, *Joseph W. Stewart*
SOUTHWESTERN RADIO AND TELEVISION COMPANY, Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

AMERICAN TELEVISION COMPANY, Intervenor

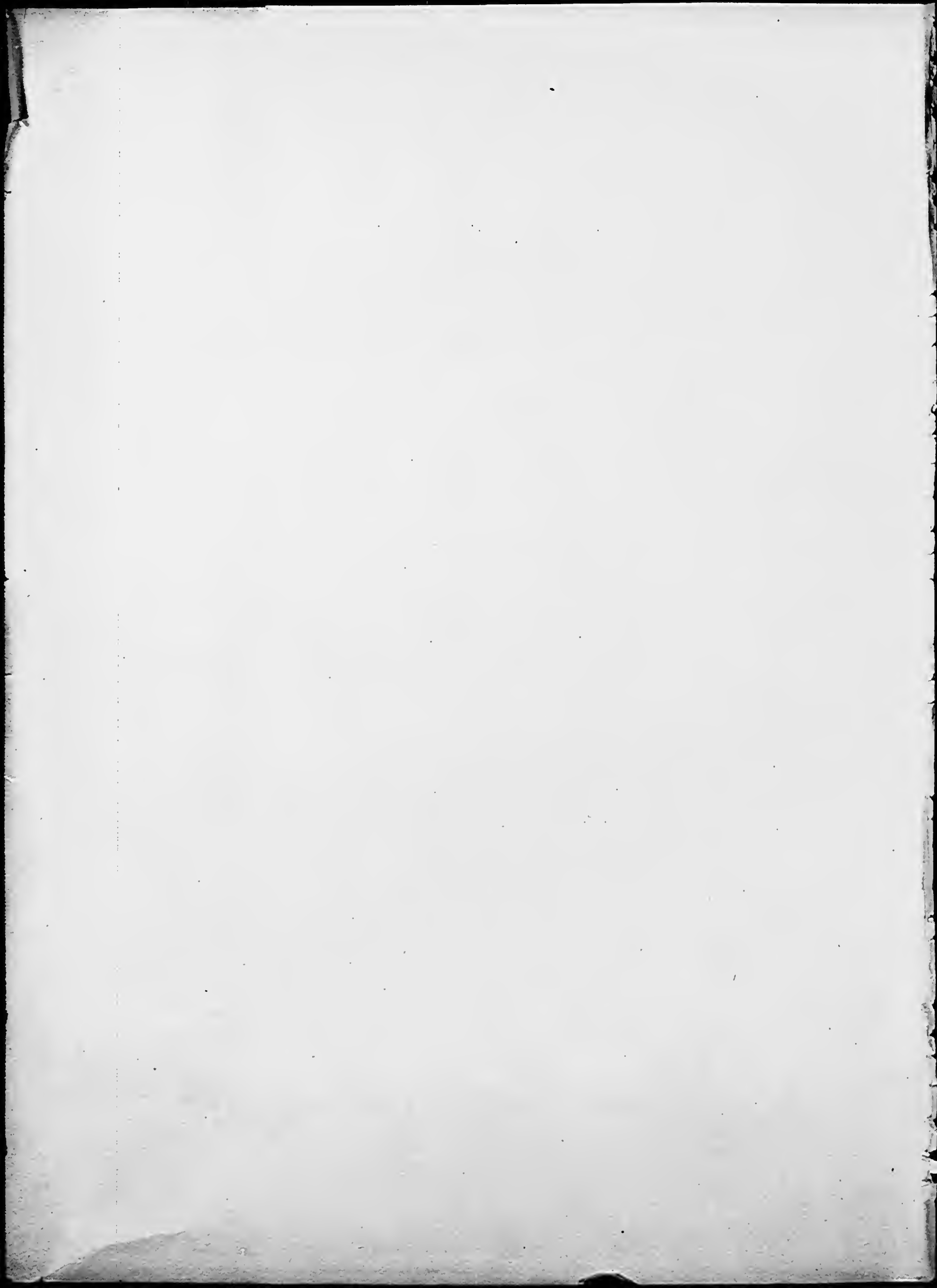
ON APPEAL FROM DECISIONS AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

In a prehearing stipulation entered into by all the parties to this case and approved by order of this Court dated September 6, 1956, the parties stipulated:

I. The questions presented by this appeal are:

1. Whether the Commission erred in holding that appellant Southwestern Publishing Company was not a party in interest to the proceeding on Intervenor's applications for extension of construction permit and consent to the involuntary transfer of control of Intervenor at the time when said appellant requested that the record be reopened for the taking of further evidence, and in failing to pass upon the standing of appellant Southwestern Radio and Television Company.

2. Whether the Commission erred in failing to consolidate for hearing the applications by Intervenor for transfer of control and for extension of construction permit in order to resolve the questions raised by appellants with respect to the present qualifications of Intervenor to construct and operate the proposed television station in the public interest.

3. Whether the Commission had before it sufficient facts upon which to make the public interest determinations prerequisite to the grant of the Intervenor's applications.

II. Appellee and Intervenor reserve the right to question the standing of either appellant to appeal and/or to raise either question 2 or question 3. The standing question may either be raised in a separate motion to dismiss or may be raised with briefs on the merits.

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FEDERAL COMMUNICATIONS COMMISSION, Appellee

AMERICAN TELEVISION COMPANY, Intervenor

APPEAL FROM DECISIONS AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The Statement of the Case in appellants' brief adequately presents the history of this appeal. However, it is believed that a short summation of the immediately material facts will be of assistance to the Court.

This is an appeal in which two parties are seeking review in one action of two separate orders of the Commission entered in separate, unconsolidated proceedings. The first order was the grant of an extension of time to intervenor, American Television Company, Inc. (American) to complete construction of its television station. The second order was a grant of an application for consent to the involuntary transfer of control of American from Mr. H.S. Nakdimen to Salome Nakdimen, as administratrix of his estate. The relevant facts are as follows:

An application to assign the construction permit for television broadcast station KNAC-TV, Fort Smith, Arkansas, from American to Southwestern Publishing Company (Southwestern Publishing) was designated for hearing together with an application of American for an extension of time to complete construction.^{1/} Both applications were designated for hearing on May 4, 1955 on one issue, i.e., possible trafficking in the permit (R. 96-96A). After an initial decision by the Examiner, released October 3, 1955, proposing a grant of both applications (R. 161-165A), Mr. H.S. Nakdimen, the President and sole stockholder of American^{2/} died, on December 20, 1955 (R. 404). The contract for the assignment of the construction permit was then due to expire on April 1, 1956 (R. 206-207). It was not extended by the parties.

On April 10, 1956, Southwestern Publishing filed a petition to set aside the initial decision and reopen the record for the taking of further evidence (R. 287-300). This petition urged essentially that with the death of Mr. Nakdimen and the lapse of the assignment contract, new questions had arisen as to the future operations and control of American which had to

^{1/} The assignment application was filed on December 20, 1954 (R. 2). The application for extension of time to construct was filed on December 27, 1954 (R. 355). The completion date then applicable was February 3, 1955.

^{2/} Mr. George T. Hernreich held an option to buy 50% of the stock (R. 162).

be examined before an extension of the construction permit could be granted. Any application for involuntary or voluntary transfer of control of the permittee, it was said, should also be consolidated in the hearing.

American, on the same day, petitioned to have the pending application for a transfer to Southwestern Publishing dismissed as moot, in view of the expiration of the contract between the parties, and for immediate grant of the application for extension of time to complete construction (R. 302-304). American (R. 310-315), and the Commission's Broadcast Bureau (R. 316-323), opposed Southwestern Publishing's request to reopen the record. Southwestern Publishing, in a response to American's request for an immediate grant of extension, opposed a grant of American's application for extension of completion date, but agreed that the application for a transfer of the construction permit to it could not be granted (R. 325-330). This response, although submitted as the response of Southwestern Publishing, was also signed at the end by appellant Southwestern Radio and Television Company (Southwestern Radio), which is a wholly owned subsidiary of Southwestern Publishing and the permittee of television station KFSA-TV, in Fort Smith. Southwestern Radio had not been a party in the hearing and did not seek to intervene.

Finally, Southwestern Publishing, in a pleading which was also signed by Southwestern Radio, filed a reply to the op-

positions to its petition to reopen the record (R. 332-344), and American filed a reply to the response to its petition for an immediate grant of its application for extension of time to complete construction (R. 346-348).

On June 20, 1956, the Commission adopted its Memorandum Opinion and Order in the hearing proceeding (R. 351-352A). It agreed with the Examiner that there had been no trafficking, but also found that this issue had been mooted by virtue of the expiration of the contract for a transfer from American to Southwestern Publishing. Since the question of trafficking, which arose out of American's proposal to transfer its permit to Southwestern Publishing, was the only issue in the proceeding, the Commission decided that the proceeding itself was in effect mooted and that Southwestern Publishing had lost its status as a party in interest because of the termination of its contract to acquire the permit. It accordingly found Southwestern Publishing's request to reopen the record to be moot also. The Commission therefore dismissed the application for a transfer to Southwestern Publishing, and granted American an extension of time to complete construction. This is the first action appealed from.

The second action appealed from is the separate grant, on June 26, 1956, of an application for involuntary transfer of control of American from H. S. Nakdimen to Salome Nakdimen, administratrix of the estate. (See R. 354.) This grant, which was not involved in the hearing proceeding discussed above, was

made by the Chief of the Broadcast Bureau under a standing delegation of authority from the Commission. Further consideration of this action by the Commission itself was not sought.

SUMMARY OF ARGUMENT

I.

The Commission properly held that Southwestern Publishing lost its standing as a party in interest to the application of American for an extension of construction permit when its contractual relationship with American lapsed. Assuming that its subsidiary Southwestern Radio can be said to be aggrieved by the grant of the extension of American's construction permit this fact does not confer standing to appeal on Southwestern Publishing, for the two appellants are separate corporate entities and the parent cannot claim standing through its subsidiary. Therefore, Southwestern Publishing's appeal from this grant should be dismissed since it is not a person who is aggrieved or adversely affected by the Commission action. Communications Act, Section 402(b)(6).

Southwestern Radio cannot appeal the grant of the extension of the construction permit since it was not a party to the proceeding in which the action was taken and did not file a petition for rehearing. Communications Act, Section 405. Its signature of pleadings filed by Southwestern Publishing could not, in the absence of a proper motion to intervene giving its reasons for seeking late intervention, operate to give it the

status of a party.

II.

Southwestern Publishing also lacks standing to appeal the grant of the application for consent to the involuntary transfer of control of American from H.S. Nakdimen to the administratrix of Nakdimen's estate. Assuming the standing of Southwestern Radio no adequate reason for denying the application was properly presented to the Commission and no error in the grant has been shown.

The Commission has adopted special rules and forms governing transfers resulting from death, under which it does not require the same comprehensive type of showing of qualifications required of applicants seeking permanent authority, but rather looks primarily at the legal qualifications of the executor or administrator to perform his temporary duties. The validity of this procedure has not been attacked here nor have appellants given any substantial reason based on any other ground why it was not in the public interest to permit the involuntary transfer to the administratrix in this case. On the contrary, the questions raised, which are commingled in appellants' brief with their discussion of the construction permit, have no relevance to the involuntary transfer of control, but rather primarily concern the future operation of the station by trustees who have not yet undertaken their duties. The grant of the application for involuntary transfer of control should be affirmed.

ARGUMENT

I. The Commission Properly Held That Southwestern Publishing Lacked Standing With Respect To The Grant Of American's Application For Extension Of Construction Permit. Southwestern Radio Is Precluded By Section 405 Of The Communications Act From Appealing That Grant.

The first Commission action challenged by appellants is the grant, after a hearing, of American's application for an extension of time to complete construction of its station.^{3/} However, the appeal from this action taken by Southwestern Publishing should be dismissed because, as the Commission held, it is not aggrieved or adversely affected and lacks standing. Furthermore, the appeal of Southwestern Radio should also be dismissed because it was not a party to the proceeding in which the grant was made and could not appeal without first seeking rehearing before the Commission.

The Commission held that Southwestern Publishing lost

3/ Such an application is not one for a modification under Sections 308 and 309 of the Act, 47 U.S.C. 308, 309, but is governed by Section 319(b) of the Communications Act, 47 U.S.C. 319(b), which provides: "Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee." This Section does not provide for the complete examination of qualifications required under Section 319(a), 47 U.S.C. 319(a) (Appendix, infra, p. 21), for the issuance of an original construction permit, nor does it provide, as does Section 319(c), 47 U.S.C. 319(c) (Appendix, infra, p. 21), which is applicable to the grant of a license, for a denial upon the basis of new facts not presented when the construction permit was granted.

Section 3.627 of the Commission's Rules and Regulations,

its standing as a party in interest with respect to the American extension of construction permit when the contract of sale expired on April 1, 1956. If this determination was correct it necessarily means that Southwestern Publishing lacks standing to appeal the grant of the extension as a person aggrieved or adversely affected under Section 402(b) of the Act, 47 U.S.C. 402(b). There is no question but that it was a correct determination.

Southwestern Publishing concedes (Br. 22) that its stake in the proceeding may have been altered by the lapse of its contract, and apparently recognizes that as a separate corporate entity there was no stake or interest of any sort left to it. Its claim of interest, which is interspersed with arguments on the merits of the grant, is primarily in its capacity as the corporate parent of Southwestern Radio, which is the permittee of another television station in Fort Smith (Br. 22-26). This is inadequate.^{4/}

^{3/} 47 CFR 3.627, 1 Pike & Fischer, RR 53:636 (Appendix, infra, p. 23), accordingly provides that an extension will be granted upon a showing related to the question of why construction was not completed on time. No allegation of error under this test has been made by appellants.

^{4/} This Court's decision on Granik v. Federal Communications Commission, ___ U.S. App. D.C. ___, 234 F. 2d 682 (Southwestern Br., p. 25), has no bearing on whether a parent corporation is a party in interest to an action which may affect its subsidiary corporation. It held merely that a person with a claimed option to buy a station was a party in interest to the disposition of the station to someone else.

The law is well settled that an action to enforce corporate rights cannot be brought by the shareholders of that corporation but must be brought by, and in the name of, the corporation itself, because the cause of action is in the corporation and a stockholder's rights are merely derivative. ^{5/} Hawes v. Okland, 104 U.S. 450; In re Michigan-Ohio Bldg. Corp., 117 F. 2d 191, 193 (C.A. 7); Singer v. Allied Factors, 216 Minn. 443, 13 N.W. 2d 378, 380; Goodwin v. Castleton, 19 Wash. 2d 748, 144 P. 2d 725. See also 18 C.J.S. Section 559; Fletcher, Corporations, Sections 2843, 5716, 5947.

Southwestern Publishing, as a corporation owning all the shares of Southwestern Radio, has no greater interest in this connection than any other shareholder. Pullman's Palace Car Co. v. Missouri Pacific R. Co., 115 U.S. 587, 597; Brodsky v. Frank, 342 Ill. 110, 173 N.E. 775, 777.

These general principles of corporation law have been applied to appeals from orders of administrative agencies. Thus, in Schenley Distillers Corporation v. United States, 326 U.S. 432, 435, the Supreme Court held that a parent corporation had no standing to appeal from an order of the Interstate Commerce Commission which aggrieved its subsidiary. The Court stated

^{5/} See also, Rule 23(b) of the Federal Rules of Civil Procedure, which does not allow suits to be brought by shareholders to enforce rights which may properly be asserted by the corporation unless the corporation itself refuses to enforce such rights. In fact, the complaint is required to state with particularity the efforts which the shareholder has made to obtain action from the directors of the corporation.

that a parent corporation which owns all the stock of a subsidiary is even less aggrieved by an order adversely affecting the subsidiary than a minority stockholder would be "f" or the parent is adequately represented for purposes of suit by the subsidiary whose conduct of the litigation it controls."^{6/} In the instant case there has been no claim of lack of capacity of Southwestern Radio to take any action deemed necessary to protect its interests as a permittee, nor did Southwestern Publishing at any time before the Commission purport to act on behalf of its subsidiary.

The application of any contrary policy in the present case would merely mean that the corporate structure may be utilized for creating subsidiaries when it suits the parent's purpose and the existence of these subsidiaries ignored when separate corporate identity appears disadvantageous. Southwestern Publishing clearly lacks standing to appeal the extension of construction permit, because that extension causes it no direct, substantial aggrievement.^{7/}

^{6/} Cf., American Power Co. v. Securities & Exchange Commission, 325 U.S. 385, 389, where the parent corporation was held to have standing to appeal from a Commission order directing the transfer of an item from the subsidiary's surplus account to another account where it would not be available for dividends. The Court there held that the order had a direct adverse effect on the parent as a stockholder entitled to dividends.

^{7/} Southwestern Publishing's further suggestion, (Br. 23) that it has standing because it said it would apply for the channel it American's extension of completion date were denied, has no substance. Such a claim of interest, which could be made by anyone, is too indirect. United Detroit Theatres Corp. v. Federal Communications Commission, 85 U.S. App. D.C. 239, 178 F. 2d 700; Mansfield Journal Co. v. Federal Communications Commission, 84 U.S. App. D.C. 341, 173 F. 2d 646.

Southwestern Radio, on the other hand, assuming it could be said to be aggrieved by the extension because it is a permittee in the same city, is barred by Section 405 of the Act from appealing. Section 405 provides in pertinent part:

* * * The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review was not a party to the proceedings resulting in such decision, order, or requirement. * * * 8/

Southwestern Radio, which was never a party to the hearing proceeding in which American's application for extension of time to complete construction was granted, failed to petition for rehearing and clearly cannot now appeal that grant.

Southwestern Radio's joinder of its signature to two of Southwestern Publishing's pleadings in the hearing (see p. 3, supra) obviously did not make Southwestern Radio a party to the hearing. These two pleadings, which were filed as the pleadings of Southwestern Publishing, were its opposition to American's request for an immediate grant and its reply to the oppositions to its petition to reopen the record. The original petition to reopen the record was not signed by Southwestern Radio. Section 309(b) of the Act, 47 U.S.C.

8/ Section 405 also provides that "After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear." (Emphasis added.)

309(b), gives interested parties a right to intervene not less than ten days prior to the date of hearing. After that point is passed, late intervention is discretionary with the Commission. Coastal Bend Television Co. v. Federal Communications Commission, ___ U.S. App. D. C. ___, 234 F. 2d 686.

Southwestern Radio could not obviate the need for a proper petition to intervene late, which would require a showing of its interest and its reasons for not coming in on time, by merely signing the pleadings of a party to the hearing. As shown by the Commission's recitation of the pleadings before it in its opinion, which makes no mention of Southwestern Radio (see R. 351), it is clear that the Commission had no idea that Southwestern Radio considered itself as participating in the hearing or even attempting to do so.

It may well be that these jurisdictional impediments appear to have an unjust effect from appellants' point of view. For, Southwestern Publishing, which was in the hearing, lost its interest and standing, and Southwestern Radio, which may have acquired an interest for the first time when its parent lost its standing, ^{9/} is precluded from appealing on

^{9/} Southwestern Publishing had previously intended to have Southwestern Radio's television station in Fort Smith cease operation when Southwestern Publishing should acquire American's permit.

another ground. But there is no real injustice here. Southwestern Radio, if it deemed itself interested for the first time near the end of the hearing, could have petitioned to intervene and explained its failure to intervene in timely fashion. If it had done so and had been rejected by the Commission, a different question would be presented. But, it did not do this and, without seeking rehearing under Section 405, has directly filed its notice of appeal. This it may not do.

This appeal must therefore be dismissed as to both appellants insofar as review is sought of the grant of American's application for extension of time to complete construction.

II. No Error Has Been Shown In the Grant Of The Application For Involuntary Transfer Of Control Of American.

On June 26, 1956, subsequent to the conclusion of the hearing on American's application for an extension of time to complete construction, the Commission granted without hearing an application for the involuntary transfer of control of American from H.S. Nakdimen to Salome Nakdimen, as administratrix of Mr. Nakdimen's estate. No error in the grant has been shown.

The approval of the involuntary transfer of control, as well as the grant of an extension of time to complete construction, has also been appealed by both Southwestern Publishing and Southwestern Radio. However, it is clear, for the same reasons given in Point I, supra, that the former

lacks standing. It has no interest of its own in the transfer of control and cannot claim an interest through its subsidiary. And, insofar as the remaining appeal of Southwestern Radio is concerned we believe that no facts were properly brought to the Commission's attention in opposition to the transfer application which show any error in the grant.

As mentioned above, the grant of consent to the involuntary transfer of control of American was made in a separate proceeding under a staff delegation of authority.^{10/} No pleadings were filed by either Southwestern Publishing or Southwestern Radio under the file number of this application, or directly addressed to it. The involuntary transfer was mentioned by appellants only in the pleadings of Southwestern Publishing submitted in the entirely separate hearing on the application for extension of construction permit, two of which were also signed by Southwestern Radio. These pleadings, which the Commission found to be moot when Southwestern Publishing's contract with American expired, suggested that the transfer application raised some of the same questions as the extension application and thus should be consolidated with it. Just which questions the two applications had in common was not made clear, an ambiguity which has been continued in appellants' brief. So too, although the Commission's Rules

^{10/} See Section 0.241(d)(6) of the Rules and Regulations, ~~47~~ ~~CFR 0.241(d)(6)~~, 1 Pike & Fischer, RR 51:64c, at 51:66.

specifically provide that upon the filing of a petition for reconsideration, by a person aggrieved, of an action taken under a delegation of authority, "every such petition shall be passed upon by the Commission," (Section 0.202(a),

1 Pike & Fischer, RR 51:61 (Appendix, infra, p. 22)), appellants did not seek to have the Commission review the staff's action granting the transfer application. They are thus in no position to complain, as they seek to do (Br. 25 Note 8), that the Commission itself did not consider the application. When this background of the matter before the Commission is considered together with the nature of an involuntary transfer of control and the type of questions raised by appellants in their brief, it is clear that even if appellants could be said to have properly presented objections to the Commission, no error in the grant has been shown.

An involuntary assignment or transfer of control, while subject to the public interest standard of Section 310(b) of the Communications Act, 47 U.S.C. 310(b), necessarily involves certain practical differences from a voluntary transfer. An involuntary transfer of control such as the instant one, which results from a death, involves a substitution of controlling parties on a temporary basis, until such time as the executor or administrator is able to dispose of the estate, according to the terms of a will or state law, to the ultimate transferees. In this case, Salome Nakdimen has been given

control as administratrix until such control is transferred to the trustees named in Mr. Nakdimen's will.^{11/} Thus, an involuntary transfer resulting from a death not only arises from causes beyond the parties' control, but also does not involve the ultimate disposition of control.

In recognition of these peculiar elements, the Commission has adopted special rules and forms for such "pro forma" transfers, in addition to the delegation of authority to the Chief of the Broadcast Bureau to grant such applications discussed above.^{12/} Section 1.323 of the Rules, 47 CFR 1.323, 1 Pike & Fischer, R.R. 51:214 (Appendix, infra, p. 23), provides for prompt notice to the Commission of the death and for the filing of an application for consent to a transfer of control "to a person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved." Section 1.321, 47 CFR 1.321, 1 Pike & Fischer, R.R. 51:212 (Appendix, infra, p.22-23), provides for the filing of such applications on a special form, Form No. 316. That form was used here (R. 402-403).

^{11/} Letters of administration were issued by the probate court on March 12, 1956 (R. 407-408). Under Mr. Nakdimen's will, three trustees were appointed to hold all of Mr. Nakdimen's property, with exceptions not pertinent here (R. 294). No application for a transfer of control of American to the trustees has been filed or acted upon to date.

^{12/} The denial of an application, of course, could not be ordered without a hearing.

Form No. 316, used, inter alia, for involuntary transfers resulting from a death, does not require the detailed showing of legal and financial qualifications, and proposed program service, provided for in Form No. 315, which is the appropriate form under Section 1.321, supra, for applications for consent to a voluntary transfer of control.^{13/} Instead, it requires merely a showing of the circumstances leading to the transfer of control, the terms of the will or letters testamentary and all pertinent court orders, the interests involved, and a statement as to whether existing program and staffing policies will be continued. The form specifically provides that it "* * * does not cover assignments (or transfers) from the Executor, Administrator or other court appointed officers to the ultimate beneficiary." (R. 402.)

Appellants have nowhere contested the validity or propriety of the Commission's use of this "short form" application in these circumstances, and no other substantial reason has been given why it was not in the public interest for the Commission to approve the application for consent to the involuntary transfer of control of American to the administratrix of Mr. Nakdimen's estate.^{14/} No question

^{13/} Form No. 315 is reproduced at Vol. 1, Part 2, Pike & Fischer, R.R. 261-278.

^{14/} We have been unable to determine from appellants' brief just which allegations are directed to the application for involuntary transfer as distinct from the earlier grant of the application for extension of construction permit. (See appellants' brief, pp. 14-19.) It may be that all of the allegations were intended to apply to both applications. The vagueness of appellants' contentions in their brief undoubtedly results from the fact that all of the pleadings before the Commission were filed in the hearing on the

has been raised with respect to the legal qualifications of the administratrix. And most of the questions which were raised (in the pleadings submitted in the extension hearing) clearly will be applicable only to a future application for a voluntary transfer to the trustees who will take control on a permanent basis under the will.

In fact, Southwestern Publishing itself urged before the Commission that "The critical fact is that the Commission does not have before it any method of ascertaining who will actually control the Nakdimen estate once administration is completed and the testamentary trusts are established."

(Emphasis added.) (R. 337; and see p. 17, appellants' brief.)^{15/} In accordance with this view of the matter, questions were raised as to the identity of the trustees, their powers, intentions, etc. But, even assuming they were intended to apply to the involuntary transfer application, none of these matters relates to the question before the Commission of whether a temporary transfer to the administratrix would serve the public interest. Similarly, the question of Mr. George Hernreich's participation (appellants' brief, pp. 17-18), will be pertinent at such time as he seeks to exercise his option for a 50% interest.

^{14/} (Cont'd.) extension application, and the transfer of control application was mentioned only tangentially (See R. 292, 327-328, 341, 342-343).

^{15/} This claim not only is irrelevant here, but is factually incorrect, for a further application will be required for any transfer to the trustees.

The only remaining question of any possible substance^{16/} is appellants' claim that full details of the financing of construction of the station were not presented to the Commission (Br. 18-19). Here again, it is not at all clear that appellants are referring to the involuntary transfer. They state with reference to these matters that the Commission "simply refused to consider them at all because of their alleged mootness, and because Southwestern Publishing was thought to lack standing to raise them" (Br. 19). But, of course, the Commission made these determinations in the hearing proceeding on the extension of construction permit. Nothing was said by the Commission on the standing of either appellant to object to the involuntary transfer.

Assuming that these contentions are directed to the transfer of control, they fail to contain, as did the pleadings before the Commission, any allegation of lack of qualification. Surely it was incumbent upon appellants to do more, in the circumstances, than say there may be some doubt. Their burden to allege some fact or circumstance which would raise a substantial question of lack of qualification was not met.^{17/} The Commission had found American

^{16/} The claim (Br. 15) that there was some delay in the appointment of the administratrix, and some confusion as to the interim status of three executors named in the will, surely is no reason for not transferring control to a legally appointed administratrix.

^{17/} See, e.g., Southwestern Publishing's first pleading, its petition to reopen the hearing record in the extension of construction permit proceeding (at R. 290), where it commingled its discussion of the powers of the executive and trustees, and questioned their power to borrow money to build the station without alleging or showing any need to borrow money.

financially qualified when it granted the original construction permit. No fact which might have put this finding in doubt because of the death of Mr. Nakdimen was presented to the Commission.

Thus, appellants never adequately presented to the Commission any reason why the application for involuntary transfer of the American construction permit should not be granted. The reasons given on appeal, which cannot be distinguished from appellants' discussion of the entirely separate application for extension of construction permit, are inadequate to sustain the requested relief.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed in its entirety as far as Southwestern Publishing is concerned, and should be dismissed insofar as Southwestern Radio seeks to appeal from the grant of extension of construction permit; the Commission should be affirmed on Southwestern Radio's appeal from the approval of the involuntary transfer of control of American.

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December 10, 1956.

APPENDIX

Communications Act of 1934, as amended:

Section 319(a):

No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

Section 319(c):

Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309 (a), (b), and (c) shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.

Rules and Regulations of the Federal Communications Commission:

Section 0.202(a):

Any person aggrieved by any action taken under any delegation of authority made herein may file a petition for reconsideration within 30 days after public notice is given of the action complained of, and every such petition shall be passed upon by the Commission. Appeals from interlocutory action of the Motions Commissioner or Hearing Examiner must be taken within 2 days in accordance with §1.750 of the Rules and Regulations.

Section 1.321:

Application for voluntary assignment or transfer of control; broadcast. --

(a) Applications for consent to the assignment of construction permit or license for an AM, FM, television or other broadcast station or for consent to the transfer of control of a corporation holding such a construction permit or license shall be filed with the Commission on FCC Form No. 314 (Assignment of License), FCC Form No. 315 (Transfer of Control), or FCC Form No. 316 (Short Form). Such applications shall be filed with the Commission at least 60 days prior to contemplated effective date of assignment or transfer of control.

(b) Pro forma assignment or transfer applications shall be filed on FCC Form No. 316. Such cases are defined as cases in which:

(1) There is an assignment from an individual or individuals (including partnerships) to a corporation owned and controlled by such individuals or partnerships without any substantial change in their relative interests;

(2) There is an assignment from a corporation to its individual stockholders without effecting any substantial change in the disposition of their interests;

(3) There is an assignment or transfer by which certain partners or stockholders retire but no new ones are brought in, provided that the interest transferred is not a controlling one;

(4) There is a corporate reorganization which involves no substantial change in the beneficial ownership of the corporation;

(5) There is an involuntary transfer to an executor, administrator or other court appointed officer caused by death or legal disability; except that this

form does not cover assignments (or transfers) from the executor, administrator or other court appointed officers to the ultimate beneficiary;

(6) There is an assignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests;

(7) There is an assignment of less than a controlling interest in a partnership.

Section 1.323:

Application for involuntary assignment or transfer of control; broadcast and non-broadcast. - In the event of a death or legal disability of a permittee or licensee, or a member of a partnership, or a person directly or indirectly in control of a corporation, which is a permittee or licensee:

(a) The Commission shall be notified in writing promptly of the occurrence of such death or legal disability, and

(b) Within 30 days after the occurrence of such death or legal disability (except in the case of ship or amateur station), application shall be filed for consent to involuntary assignment of such permit or license or for involuntary transfer of control of such corporation to a person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved. The procedure and forms to be followed are the same as those specified in §§ 1.321 and 1.322. In the case of ship and amateur stations, involuntary assignment of licenses will not be made; such licenses shall be surrendered for cancellation upon the death or legal disability of the licensee.

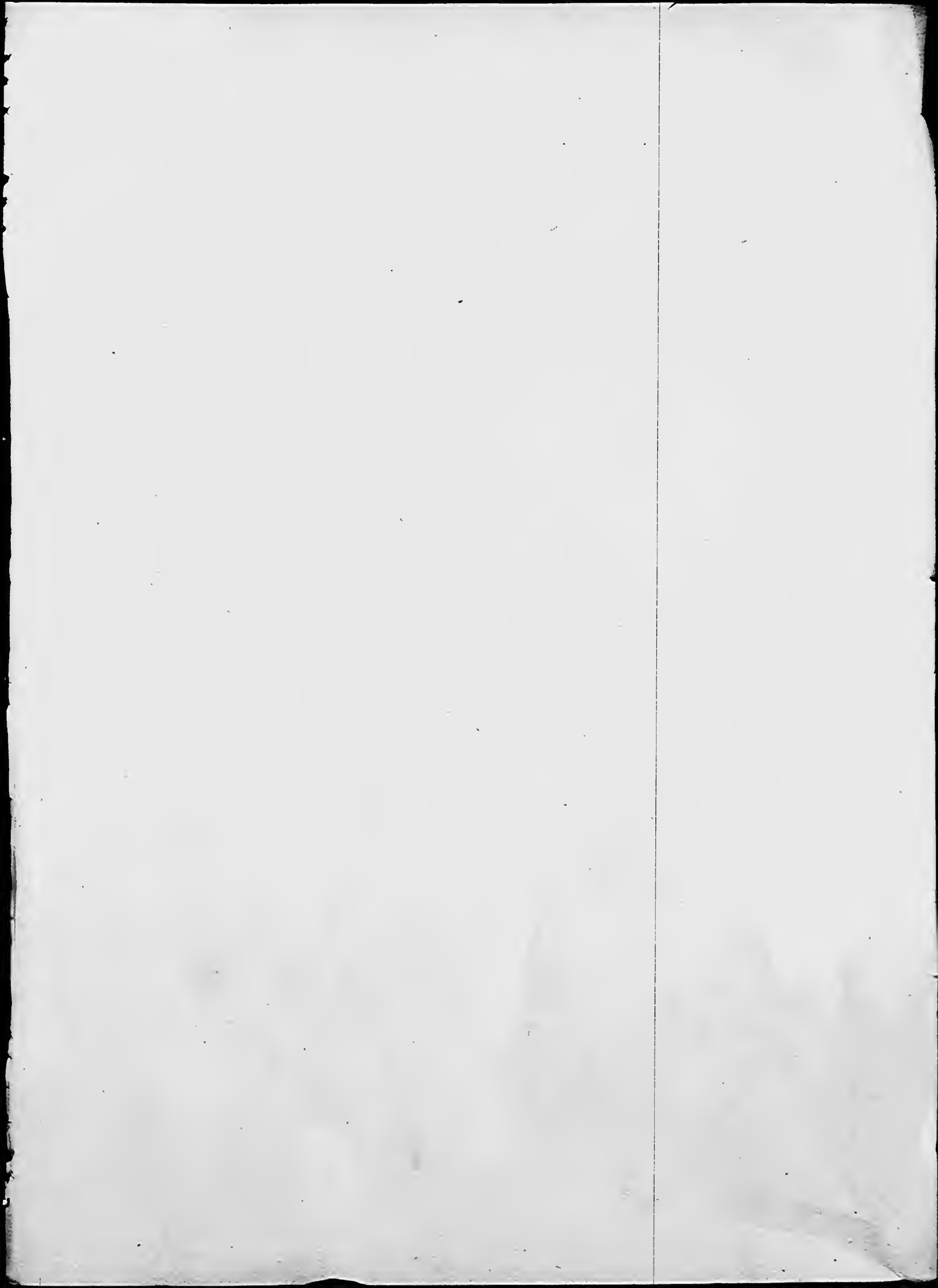
Section 3.627:

Forfeiture of construction permits; extension of time. --

(a) A construction permit shall be automatically forfeited if the station is not ready for operation within the time specified therein or within such further time as the Commission may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the Commission as of the expiration date.

(b) An application (FCC Form No. 701) for extension of time within which to construct a station shall be filed at least 30 days prior to the expiration date of such permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, such applications will be accepted upon a showing satisfactory to the Commission of sufficient reasons for filing within less than 30 days prior to the expiration date. Such applications will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension.

(c) If a construction permit has been allowed to expire for any reason, application may be made for a new permit on FCC Form 321, "Application for Construction Permit to Replace Expired Permit".



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**UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit**

No. 13,456

**SOUTHWESTERN PUBLISHING COMPANY,
SOUTHWESTERN RADIO AND TELEVISION COMPANY,**
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

AMERICAN TELEVISION COMPANY, INC.
Intervenor

ON APPEAL FROM DECISIONS AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR REHEARING

On April 4, 1957 this Court dismissed the appeals in the above-entitled case on the grounds (1) that appellant Southwestern Publishing Company lacked standing to appeal the Commission's order extending intervenor's construction permit because it was not aggrieved or adversely affected by the Commission's order, and (2) that appellant Southwestern Radio and Television Company lacked standing to appeal because it had not sought formally to intervene as a party to the proceedings before the Commission. The Court found that the Commission had erred in refusing to consider various substantial points presented

to it (Slip Op. pp. 5, 7), but the Court deemed itself powerless to reverse the Commission because the Court concluded that neither of the appellants had the requisite standing to appeal (Slip Op. pp. 6-7).

It is respectfully requested that this Court reexamine that portion of its decision relating to standing because it is believed that certain salient aspects of the bases of the standing of the appellants were inadvertently overlooked by the Court, perhaps because of insufficient emphasis on the standing question in appellants' briefs and oral argument. In addition, it appears that the Court's decision is inconsistent with the rationale of the decision in Gerico Investment Co. v. Federal Communications Commission, _____ U.S. App. D.C. _____, 240 F. 2d 410, a decision rendered after the filing of the briefs in this case.

I. Standing of Southwestern Radio and Television Company

The Court noted that, as an operator of a competing television station, Southwestern Radio and Television Company would be aggrieved by the extension of its competitor's authorization (Slip Op. pp. 6, 7). But the Court held that Southwestern Radio's failure to file a formal petition for intervention or rehearing was fatal to its appellate standing under Section 405 of the Communications Act, 47 U.S.C. 405.

Section 405 provides in pertinent part as follows:

The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision *** except where the party seeking such review (1) was not a party to the proceedings resulting in such decision***.

The central question is whether the above statutory provision requires that to acquire standing to appeal one be named as a formal party, or whether the statute merely requires that he have participated in

the proceedings before the Commission and fully presented his contentions before that agency. We think it clear that participation in fact satisfies the intent of the statute. As this Court held in Gerico Investment Company v. Federal Communications Commission, _____ U.S. App. D.C. _____, 240 F. 2d 410 (decided January 17, 1957, Slip Op. p. 3):

The obvious purpose of section 405 is to afford the Commission an opportunity to consider and pass upon matters prior to their presentation to the court. The Commission itself does not assert that it lacked that opportunity in this case. Gerico by its petition to intervene sought to become a party, to obtain a hearing by the Commission on the questions it presented, and it stated the grounds for the relief it desired. The Commission considered the questions presented by Gerico and denied the relief sought. Thus Gerico was not a stranger to the proceedings, or one whose position was rejected at the threshold. Its position was entertained on the merits and then rejected, and it is this action of the Commission which is the subject matter of this appeal. The real objective of section 405 accordingly was accomplished. Only too literal and narrow an interpretation of the words of section 405 would preclude our considering Gerico a party within its meaning, and denying our jurisdiction in the circumstances of this case. [Emphasis added.]

The Gerico decision was not previously relied upon by appellants in this case because it was rendered subsequent to the filing of the briefs herein, and on the very day of the oral argument before this Court. Under the standard promulgated in Gerico, supra, it is submitted that Southwestern Radio should be held to have been a "party" before the Commission within the meaning of Section 405 of the Communications Act, and thus to have standing to prosecute its appeal from the Commission's decision extending intervenor's construction permit.

In the present case the Commission does not and cannot assert that it lacked the opportunity to consider and pass upon the matters raised by Southwestern Radio and Television. Here, as in Gerico,

Southwestern Radio was not "a stranger to the proceedings;" it formally joined the detailed pleadings filed by Southwestern Publishing which the Commission refused to consider. Here, as in Gerico, "the real objective" of Section 405 was accomplished. The Commission was not left in the dark as to the questions raised; in this case, it deliberately and erroneously refused to consider them.

The only distinction between this case and Gerico is that in Gerico the appellant entitled its request for relief a petition for intervention, whereas here appellant Southwestern Radio limited itself to formal joinder in the requests for relief filed by a formal party to the proceeding (appellant Southwestern Publishing). In neither Gerico nor the present case would the requirement of Section 405 have been satisfied if that requirement were to be given a narrow, literal interpretation, because in neither case was the appellant a formal party to the Commission proceedings. But in both cases the "obvious purpose of Section 405*** to afford the Commission an opportunity to consider and pass upon matters prior to their presentation to the Court" was fully satisfied (Gerico Slip Op., p. 3). Here, as in Gerico, there was standing to appeal.

II. Standing of Southwestern Publishing Company

The Court concluded that Southwestern Publishing, although a recognized party to the proceedings before the Commission, was not aggrieved by the Commission's decision merely on the basis of Southwestern Publishing's interest as the corporate parent of Southwestern Radio and Television, which operates a competing television station in the community involved (Slip Op., p. 6). We do not request reconsideration of that ruling. But Southwestern Publishing's interest in this proceeding is not limited to its role as corporate parent; it is independently aggrieved by the Commission's action in extending intervenor's construction permit.

Appellant Southwestern Publishing was previously an applicant in its own right for assignment to it of the construction permit for the television channel (channel 5) for which intervenor sought and was granted an extension of construction permit. Southwestern Publishing diligently sought to present facts to the Commission which would lead it to deny the requested extension of the channel 5 permit, so that Southwestern Publishing could reapply for the channel. Southwestern Publishing's avowed purpose was stated as follows (JA 17):

So long as the assignment application was pending, the Commission was forbidden by the letter and spirit of Section 310 of the Communications Act from considering the qualifications of possible applicants for the channel other than the proposed assignee. Now that the assignment, as proposed, apparently cannot immediately be accomplished, the Commission has before it only the question of whether it should exercise its discretion in favor of extending a construction permit where the makeup of the permittee has radically changed, or whether it should deny such extension and receive applications for channel 5 from all qualified persons who desire to apply at this time. If the Commission should follow the latter course, Southwestern would promptly file an application for channel 5.
[Emphasis added.]

It is abundantly clear that had intervenor been denied the requested extension of construction permit, Southwestern Publishing would have been in a position to obtain the authorization for channel 5 which it sought. The Court has held that the Commission acted improperly in refusing to consider the pertinent public interest questions raised by Southwestern with respect to the extension application (Slip Op. p. 5). It seems evident, therefore, that Southwestern Publishing was aggrieved by the Commission's refusal to consider those questions, since proper consideration of them might have led the Commission to deny the extension and throw open the channel for application by Southwestern Publishing.

The injury to appellant Southwestern Publishing was immediate, real and substantial. By unlawfully refusing to consider whether the public interest required denial of intervenor's application, the Commission effectively deprived Southwestern Publishing of the opportunity to apply for the channel involved. In light of the decisions of this Court in Granik v. Federal Communications Commission, 98 U.S. App. D.C. 247, 234 F. 2d 682 and McClatchy Broadcasting Company v. Federal Communications Commission, _____ U.S. App. D.C. _____, 239 F. 2d 19, cert. den. 25 Law Week 3278, and the decision of the Supreme Court in Federal Communications Commission v. Storer Broadcasting Company, 351 U.S. 192, it is clear that Southwestern Publishing's claim of interest cannot be dismissed as based upon injury to a mere applicant. In McClatchy and Storer a former losing applicant (with hopes for another chance to secure the frequency involved) and a potential future applicant, respectively, were held to have sufficient standing to appeal orders of the Commission having an impact on their future chances to secure a grant.

In sum, Southwestern Publishing has standing here to invoke this Court's jurisdiction to force the Commission to face up to public interest questions which, if properly resolved, may require deletion of intervenor's authorization for channel 5, thus making the channel available for grant to Southwestern Publishing.

CONCLUSION

It is respectfully submitted that it would be a miscarriage of justice to permit a clearly erroneous decision of the Federal Communications Commission to stand unreversed on the basis of an unnecessarily restrictive interpretation of Section 405 of the Communications Act.

There is no question but that appellants here fully presented their contentions to the Commission and that the Commission wilfully refused to consider them in defiance of repeated decisions of this Court, of which Clarksburg Publishing Company v. Federal Communications Commission, 96 U.S. App. D.C. 211, 225 F. 2d 511, is typical. There is no question but that appellants have a real interest in the outcome of this case: Southwestern Radio and Television is operator of a competing UHF television station in the same community and Southwestern Publishing has sought continuously since 1954 to apply in its own right for the television channel at issue.

Both appellants are precisely the sort of private attorneys general who were intended by Congress to be encouraged to act as watch dogs to vindicate the public interest by seeking judicial correction of erroneous Commission decisions. Each has a clear cut interest which gives it the standing to be heard. Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470. It is earnestly urged that a ruling that this Court is powerless to reverse the Commission's erroneous decision would be contrary to the Congressional policy embodied in the Communications Act as interpreted in the Sanders case. It would also be contrary to the salutary rationale of Gerico Investment Company, supra, in which it was recognized that the standard of Section 405 is satisfied where the Commission has had a full and fair opportunity to pass on the contentions of appellant.

For the foregoing reasons, the Court's decision of April 4, 1957 should be reconsidered and vacated, the Commission's decision of June 22, 1956 extending intervenor's construction permit should be reversed, and the cause should be remanded to the Commission for further proceedings in accordance with law.

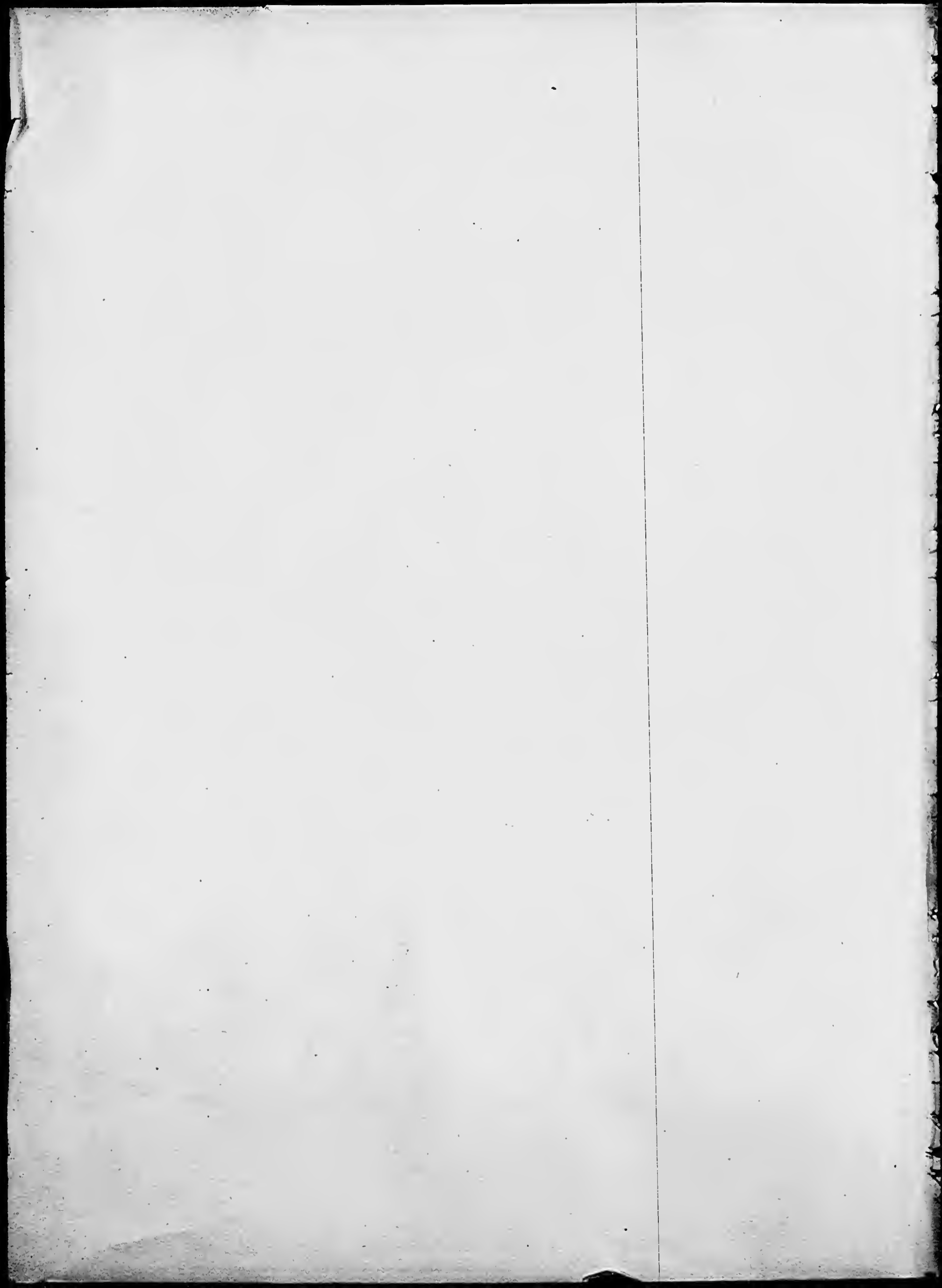
Of Counsel:
Haley, Doty & Wollenberg
May 14, 1957

Respectfully submitted,
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**CERTIFICATE OF GOOD
FAITH**

I, the undersigned do hereby certify that the petition for rehearing is filed in good faith and not for the purpose of delay.

J. Roger Wollenberg



REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED

DEC 21 1956

No. 13,456

Joseph W. Stewart

CLERK

SOUTHWESTERN PUBLISHING COMPANY,
SOUTHWESTERN RADIO AND TELEVISION COMPANY,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
AMERICAN TELEVISION COMPANY, INC.,
Intervenor.

ON APPEAL FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

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**SOUTHWESTERN PUBLISHING COMPANY,
SOUTHWESTERN RADIO AND TELEVISION COMPANY,
Appellants,**

v.

**FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
AMERICAN TELEVISION COMPANY, INC.,
Intervenor.**

**ON APPEAL FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION**

REPLY BRIEF FOR APPELLANTS

Neither appellee nor intervenor has denied that in the case at bar the Commission declined to consider and pass upon significant contentions advanced by appellants with respect to the present qualifications of American Television Company, Inc. to construct and operate a television station in the public interest. In seeking to justify and defend the Commission's decisions, therefore, appellee and intervenor have been compelled to adopt the position that it is lawful for the Commission to grant applications for station authorizations, while refusing or failing to consider substantial questions as to whether such grants would be in the public interest. This seemingly deliberate abdication of responsibility upon the Commission's part is sought to be excused

mainly upon the theory that the parties raising the contentions which the Commission refused to consider lacked proper standing to do so (Appellee's Br. 7-13, Intervenor's Br. 3-15). The present brief will be confined to a discussion of the unsoundness of the legal theory that the Commission may ignore public interest factors unless raised by persons with formal standing, and discussion of the basis for appellants' standing.

I.

**THE COMMISSION ACTED UNLAWFULLY IN
GRANTING AMERICAN'S APPLICATIONS FOR
EXTENSION OF CONSTRUCTION PERMIT AND
TRANSFER OF CONTROL WITHOUT RESOLVING
SUBSTANTIAL QUESTIONS WITH RESPECT TO
AMERICAN'S PRESENT QUALIFICATIONS**

The noteworthy feature of the briefs filed by appellee and intervenor lies not in what is said therein, but in the total absence of any attempt to refute appellants' two central assertions of fact (Appellants' Br. 5-11): (1) that appellants raised before the Commission grave questions as to American's present financial and other qualifications to construct and operate a television station, and (2) that the Commission declined to consider and pass upon those questions.¹

The factual context in which this refusal occurred was not a complicated one. The Commission initially designated for hearing American's application for extension of construction permit (and the application for assignment to appellant Southwestern) because of a question as to whether American's proposed assignment of its construction permit to appellant Southwestern Publishing constituted trafficking in a construction permit (Appellants' Br. 4). At the time that the hearing was ordered in March 1955, there was no other unresolved question concerning the application for extension of construction permit (R. 352).

¹ Indeed, none of the facts set forth in appellants' Statement of the Case is controverted by appellee or intervenor.

A year later, however, when the proceedings were coming to a close, certain significant changes had occurred, flowing principally from the death of Hiram S. Nakdimen, President and owner of American (Appellants' Br. 14-19). These events, which were detailed in the pleadings filed by appellees before the Commission (id. 5-8, 14-19), clearly required investigation by the Commission and a determination as to whether American was presently qualified in 1956 to construct the proposed television station at Fort Smith, a station which it had been authorized to construct since 1954, but which had not been constructed. Yet the Commission resolutely declined to consider these new, and highly pertinent developments (R. 352).

In appellants' opening brief reference was made to the line of authorities which establish that the Commission is required by law to consider changed facts affecting the public interest when they occur during the pendency of proceedings before it (e.g., The Enterprise Company v. Federal Communications Commission, 97 U.S. App. D.C. 374, 231 F.2d 708, cert. den. 351 U.S. 920, and see Appellants' Br. 21-22). Although the application of these authorities to the situation at bar is quite clear, the Commission ignored them. Indeed, the Commission went so far as to hold that appellants "should not now be permitted to extend the existing hearing record through additional evidence on entirely different matters" (R. 352). This is a scarcely veiled way of saying that the Commission refuses (as it erroneously refused in The Enterprise Company, supra) to consider new facts which might require new evidence, regardless of how pertinent those facts may be to the matter at hand.

The failure to consider significant public interest factors cannot be justified by attacks upon appellants' standing. For the reasons detailed in appellants' opening brief (pp. 22-25) and in Point II, *infra*, it is clear that appellants were parties in interest who would be aggrieved and adversely affected by grant of America's applications. But even if appellants' standing had been technically deficient in some respect,

such lack of standing would not warrant the Commission in declining to consider highly material and relevant public interest questions bearing on the applications before it. Clarksburg v. Federal Communications Commission, 96 U.S. App. D. C. 211, 225 F.2d 511; Federal Broadcasting System, Inc. v. Federal Communications Commission, 96 U.S. App. D. C. 260, 225 F.2d 560; Hall v. Federal Communications Commission, ___ U.S. App. D. C. ___, ___ F. 2d ___ (Case No. 13231, decided September 6, 1956).

It would hardly seem that the teaching of the above cases as to the Commission's duty to consider all relevant public interest factors could be misunderstood. Thus, in dealing with a protest case arising under Section 309(c), this Court held in the Clarksburg case, supra, that (96 U.S. App. D. C. at 215, 225 F.2d at 515):

The statute contemplates that, in appropriate cases, the Commission's inquiry will extend beyond matters alleged in the protest in order to reach any issue which may be relevant in determining the legality of the challenged grant. Clearly, then, the inquiry cannot be limited to the facts alleged in the protest where the Commission has reason to believe, either from the protest or its own files, that a full evidentiary hearing may develop other relevant information not in the possession of the protestant.
[Emphasis added.]

In the present case the information was not lying dormant in the files of the Commission. It was being aggressively and vigorously pressed upon the Commission by appellants (Appellants' Br. 5-9, 14-20).

It is significant that neither appellee nor intervenor even attempts to reconcile the Commission's actions here with this Court's decisions in Clarksburg, Federal and Hall, supra. Appellee and intervenor may now seek to argue that the rule applied in those cases is limited to "protest" cases arising under Section 309(c), but there is no basis for such an artificial limitation. The three subsections of Section 309 of the Communications Act are not to be read in isolation as if they were parts of separate, unrelated statutes. Together, they

form a comprehensive statutory scheme for processing of applications.

Section 309 (a) permits grants without hearing if and only if the Commission finds that the public interest, convenience and necessity would be served thereby. Where the Commission finds itself unable to make the requisite public interest finding, and the applicant is unable to cure the deficiencies, Section 309 (b) requires a hearing upon the "grounds or reasons then obtaining". Section 309 (c) provides for a hearing at the instance of an interested private party who protests after a grant without hearing has been made initially by the Commission. Under the statutory scheme, the duty of the Commission to consider all known facts bearing on the public interest before making a grant does not differ whether the Commission happens to be proceeding under Section 309(a), 309 (b) or 309 (c).

Intervenor, apparently recognizing that the Commission's actions in the case at bar cannot be squared with the above-cited decisions of this Court construing Section 309, argues that the public interest standard embodied in Section 309 is not applicable with respect to an application for extension of construction permit. Grant of such an application is thought to be within the uncontrolled "discretion" of the Commission (Intervenor's Br. 9), and it is urged that "third persons have no right to participate in proceedings affecting extension of construction permits" (Id. 8).

Intervenor's novel argument seems to be rested on the language of Section 319 (b) which specifies that each construction permit issued by the Commission "shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow" (emphasis added). Section 319 (b), however, does not purport to be a grant of authority to the Commission. It merely specifies certain conditions to be embodied in construction permits.

The scope of the authority granted to the Commission to grant applications is found in Sections 308 and 309. Section 308 (a) provides, in pertinent part, that "The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor" (emphasis added). And Section 309 (discussed above) expressly establishes the standard for grant of all applications filed pursuant to Section 308.² It is apparent, therefore, that the public interest standards governing applications for an original construction permit are equally applicable to an application for extension. Here, as in Clarksburg and the other cases cited above, the Commission should have considered all relevant public interest factors drawn to its attention.³

In sum, regardless of whether appellants had formal standing to raise questions with respect to American's qualifications, the Commission acted arbitrarily, capriciously and unlawfully in granting American's application without considering the pertinent questions raised. In Point II, it will be demonstrated that, in any event, appellants had standing.

² Section 309(a), 47 U.S.C. 309(a): "If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

³ Appellee has stopped short of adopting intervenor's argument. Appellee's brief does contain a cryptic footnote (p. 7) which suggests, without authority or explanation, that an application for extension of a construction permit is not an application for "modification" under Section 308 but is "governed" by Section 319(b). This statement is at odds with the long standing administrative practice of the Commission in public notices to describe applications for extension of construction permit and grants thereof as applications for and grants of modification of construction permit to permit additional time to construct. Analytically, an extension would appear to be more in the nature of a "renewal" than a "modification". But it must be one or the other, and is therefore clearly governed by Sections 308(a) and 309. Nothing in Section 319(b) suggests to the contrary.

Whatever position the Commission may now take in an effort to defend its decisions, the Commission evidently thought, when it designated the extension application for hearing to determine whether its grant would "serve the public interest, convenience and necessity," that the usual public interest standard must be satisfied (R. 96, 96A). And the Commission's final decision punctiliously included a finding in the language of Section 309(a) (R. 352).

II.

**APPELLANTS HAD STANDING BEFORE THE
COMMISSION AND STANDING TO APPEAL
THE COMMISSION'S DECISIONS**

The contentions of appellee and intervenor with respect to standing are so hypertechnical as to verge on the absurd. To appreciate this fully it is necessary to consider the background and nature of appellants' interests.

Appellants have a substantial and vital interest in television in Fort Smith, Arkansas. Appellant Southwestern Radio operates UHF television station KFSA-TV in that city, and appellant Southwestern Publishing owns all of the stock of appellant Southwestern Radio. In addition, Southwestern Publishing not only had applied for assignment of the VHF television authorization, but after the lapse of the assignment agreement with American, Southwestern Publishing formally advised the Commission of its intention to re-apply for the VHF channel if American's construction permit should not be renewed (R. 293).

Appellant Southwestern Radio, while not itself an applicant before the Commission, was in a real sense a party to the application for assignment of construction permit to Southwestern Publishing since Southwestern Radio expressly agreed to make its physical facilities available to its parent as well as to surrender its construction permit at the appropriate time (Appellants' Br. 3). Indeed, the application for assignment of construction permit from American to appellant Southwestern Publishing was necessarily premised upon the undertaking of Southwestern Radio to surrender its UHF permit if its parent should obtain the VHF authorization.⁴ Southwestern Radio had no occasion to become a formal party to the hearing on the assignment and extension applications,

⁴ Under Commission Rules, parties subject to common ownership are not permitted to have two television stations in one city. Section 3.636(a) (1), I Pike & Fischer, R.R. p. 53:641.

since its interests in that hearing were being fully represented by its parent, Southwestern Publishing.

When the agreement for assignment of American's construction permit to appellant Southwestern Publishing lapsed on April 1, 1956, the emphasis of the proceeding and appellants' position therein changed (Appellants' Br. 5-8). The question left for decision was whether American's construction permit should be extended. The qualifications of American to construct and operate the proposed station, which were unimportant so long as it was proposing to assign its permit, now became crucial. Appellants had a direct interest in questioning those qualifications since American was now a potential competitor of appellants' station KFSA-TV in a community which American and appellants had previously agreed would not support more than one television station (Appellants' Br. 3). Southwestern Publishing also proposed to apply for the VHF channel in its own right if American's construction permit should not be extended (R. 293).

Appellant Southwestern Publishing, had every right, as a full-fledged party to the hearing, to raise questions as to the qualifications of American. This it did by prompt,⁵ formal, detailed and carefully documented pleadings (Appellants' Br. 5-9). Appellant Southwestern Radio's interests in the hearing continued, as before, to be adequately represented by its parent. However, to place its position formally on record, appellant Southwestern Radio joined in its parent's pleadings (R. 325, 332).⁶

It is in this context that appellee and intervenor seek to deny appellants' standing. Although no provision of law or rule of the Commission provides for elimination of a party from a hearing nunc pro tunc,

⁵ The assignment contract lapsed on April 1, 1956. When it became evident that it would not be renewed, appellant Southwestern Publishing filed its petition to reopen the record on April 10, 1956 (R. 287-300).

⁶ It did not join in the April 10, 1956 petition, but did join in the subsequent pleadings which incorporated or reiterated the requests for relief contained in that petition (R. 328-329, 343).

the Commission decided in its June 22, 1956 decision, that appellant Southwestern Publishing had lost its standing as a party on April 1, 1956, and that all pleadings filed by it after April 1 could lawfully be disregarded (R. 352). The Commission failed to rule on the standing of Southwestern Radio.

The Commission's position as stated in its brief approaches the ultimate in absurdity. Southwestern Publishing is said to have no standing because it is asserted to be only a formal party - not a real party in interest - despite its indirect 100% ownership of a Fort Smith television station with which American's station would compete. Southwestern Radio is assumed to be a real party in interest, but is said to have no standing because it never became a formal party.⁷ (Appellee's Br. 5-6.)

It was pointed out in appellants' opening brief (p. 26) that the Commission has repeatedly stated that it will consider any fact brought to its attention, whether by a party in interest or not. And the Commission's Rules provide that even those without standing as parties will be allowed to appear at hearings and present evidence, and to argue that matters should be set down for hearing.⁸ Yet it is now argued

⁷ This contention of Commission counsel cannot properly be considered because not contained in the decision sought to be sustained. See Telanserphone, Inc. v. Federal Communications Commission, and other case cited (Appellants' Br. 26).

⁸ Section 1.723, I Pike & Fischer, R.R. p. 51:363, provides as follows: "Request by nonparties to participate in hearings; communications relating to applications. (a) There will be maintained in the office of the Secretary of the Commission a record of all communications received by the Commission relating to the merits of any application pending before the Commission requesting the granting, renewal, modification, or revocation of any license or construction permit, certificate of convenience and necessity, or rate schedule. Such record shall show the name and address of the person making the statement and the substance of such statement. When the date of hearing has been set, if the matter is designated for hearing, the Secretary shall notify all persons shown by the records to have communicated with the Commission regarding the merits of such matter in order that such persons will have an opportunity to appear and give evidence at such hearing. In the case of communications bearing more than one signature, notice shall be given to the person first signing unless the communication clearly indicates that such notice should be sent to someone other than such person.

"(b) No such person shall be precluded from giving any relevant material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter.

"(c) No such communications will be considered by the Commission in determining the merits of any such matter, nor shall any such communication be considered by any hearing officer unless it has been introduced into evidence at the hearing and appears as a part of the record. The admissibility of any such communication or the Secretary's record of any such communication shall be governed by the applicable rules of evidence, and no such communication shall be admissible on the basis of a

that neither the appellant which was a formal party to the proceedings, nor the appellant which concededly had a substantial interest in the proceedings, was entitled to be heard on the question whether there should be a further hearing.⁹

The arguments of appellee and intervenor with respect to appellants' standing to appeal are as unfounded as their arguments concerning standing before the Commission. The unmistakable trend of decisions of this Court is to permit judicial review of agency action at the behest of any person who has a real and substantial interest which may be injured by that action. Camden Radio Inc. v. Federal Communications Commission, 94 U.S. App. D.C. 312, 220 F. 2d 191, 195; Granik v. Federal Communications Commission, _____ U.S. App. D.C. _____, 234 F. 2d 682; The Elm City Broadcasting Corporation v. United States, _____ U.S. App. D.C. _____, 235 F. 2d 811; National Coal Association v. Federal Power Commission, 89 U.S. App. D.C. 135, 191 F. 2d 462.

In the recent case of McClatchy Broadcasting Company v. Federal Communications Commission (Case No. 12,637, decided October 18, 1956) a former applicant whose application had been denied in a comparative hearing was held to have standing to attack a subsequent modification of the winning applicant's authorization, presumably on the theory that might have another chance to compete for the frequency if the winning applicant should be deprived of the frequency. Appellant Southwestern Publishing was an applicant (by the assignment route)

(Footnote 8 continued from previous page)

stipulation unless Commission's counsel as well as counsel for all of the parties shall join in such stipulation.

"(d) Such communications, however, may be considered by the Commission if circumstances warrant in deciding whether or not a matter shall be set down for hearing in cases where in the absence of such communication no hearing would be required by the Commission." (Emphasis added.)

⁹ The irresponsible and arbitrary character of the Commission's action in creating an artificial barrier of standing to insulate itself from consideration of appellants' contentions is underlined by the Commission's own actions in other phases of this very proceeding. It was pointed out in the opening brief for appellants (p. 26) that the Commission followed a radically different approach with respect to the pleadings of the Citizens Group for Two Television stations. That group never sought to become a party and was never held to have standing, yet the Commission held an oral argument on its contentions.

for the frequency held by American. If American's extension of construction permit (which is a modification or renewal of its basic authorization) is ultimately denied (after reversal of the grant by this Court), Southwestern Publishing will apply for the frequency (R. 291-292).

The Commission relies upon cases which hold that a mere potential applicant lacks standing (Appellee's Br. 10). In the first place, Southwestern Publishing is more than a potential applicant. It is a former applicant with a demonstrated continuing interest in acquiring the channel, as well as the owner of all of the stock of an existing station in the same community. In the second place, recent decisions of the Supreme Court indicate the necessity for reexamination of some of the older decisions on standing.

In Federal Communications Commission v. Storer Broadcasting Company, 351 U.S. 192, the Supreme Court upheld the standing of a party to challenge on appeal the validity of a Commission rule (regarding multiple ownership of broadcast stations) which did not affect any existing application of the appellant, but merely inhibited its privileges as a potential future applicant. The argument that Southwestern Publishing has no standing to appeal as an applicant might have force if the view of Mr. Justice Harlan, dissenting, had prevailed in the Storer case. In light of the view adopted by the Court, however, standing in the present case cannot be questioned.

The attack on Southwestern Radio's standing is rested on Section 405 of the Communications Act, which provides in substance that petitions for rehearing are not prerequisite to an appeal except where a new contention or a new party is involved. There is no claim here that the Commission has not been given a full opportunity to pass on appellants' contentions. The shoe is on the other foot. The Commission declined the opportunity urgently presented to it. Hence the present case has no similarity to the recent case of O'Neill Broadcasting Company v. Federal Communications Commission (Case No. 13113, decided

December 13, 1956) where questions were raised before this Court for the first time, and the appeal was dismissed for lack of jurisdiction.

Southwestern Radio, as permittee of station KFSA-TV, is aggrieved by the grants to American extending the authorization for a competing television facility and transferring control thereof. It participated in the proceedings before the Commission, and no effort was made to strike its pleadings. Indeed, in filing pleadings without seeking formal intervention, Southwestern Radio was only following the precedent set in the case of the Committee for Two Television Stations whose pleadings had been welcomed by the Commission, and had caused the Commission to hold an oral argument before the Commission en banc. (Appellants' Br. 5, 26).

In all the circumstances, it is clear that Southwestern Radio was a "party" within the meaning of Section 405 of the Communications Act. The purpose of the provision with reference to petitions for rehearing is to prevent presentation to the reviewing Court of de novo arguments upon which the Commission did not have an opportunity to pass (as in the O'Neill case supra), or which are advanced by parties who had at no time appeared before the Commission and presented their arguments to it. It would be empty formalism to hold that Section 405 required the useless ritual of a petition for "rehearing" of what the Commission had steadfastly refused to hear.

CONCLUSION

For the foregoing reasons, and those set forth in appellants' opening brief, the decisions and orders of the Federal Communications Commission here under appeal should be reversed, and the case should be remanded with directions that the Commission hold a consolidated hearing on the applications of American Television Company, Inc., for extension of construction permit and transfer of control to determine whether the public interest, convenience and necessity would be served by grants thereof, and directing that appellants be made parties thereto. There should be such other and further relief as the Court may deem proper.

Respectfully submitted,

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December 21, 1956

BRIEF FOR INTERVENOR,
AMERICAN TELEVISION COMPANY, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

District of Columbia

DEC - 7 1956

FILED DEC 10 1956

No. 13,456

Joseph W. Stewart

CLERK

SOUTHWESTERN PUBLISHING COMPANY,
SOUTHWESTERN RADIO AND TELEVISION COMPANY,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee,

AMERICAN TELEVISION COMPANY, INC.,

Intervenor.

ON APPEAL FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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(i)

QUESTIONS PRESENTED

The questions presented are correctly stated in Appellants' Brief. However, Appellee and Intervenor reserved the right to question the standing of either Appellant to appeal and/or to raise either Question 2 or Question 3, in a separate motion to dismiss or upon the briefs on the merits. This reservation was stipulated by the parties and the stipulation was approved by this Court by Order dated September 6, 1956.

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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

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SOUTHWESTERN PUBLISHING COMPANY,
SOUTHWESTERN RADIO AND TELEVISION COMPANY,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

AMERICAN TELEVISION COMPANY, INC.,
Intervenor.

ON APPEAL FROM DECISIONS AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR,
AMERICAN TELEVISION COMPANY, INC.

PRELIMINARY STATEMENT

American Television Company, Inc., Intervenor herein, holds a construction permit for Channel 5 in Fort Smith, Arkansas. It participated in the proceedings before the Federal Communications Commission which resulted in an order released June 22, 1956 granting an extension of time within which to complete construction of its television station. (R. 351-352A) This is one of two Commission orders which Appellants seek to have this Court review.

The second order was entered on June 26, 1956 and released on July 3, 1956. In it the Commission granted its consent to the transfer of control of Intervenor resulting from the death of Hiram S. Nakdimen, the controlling stockholder of Intervenor. The control so transferred was an involuntary transfer and was from Hiram S. Nakdimen to Salome Nakdimen, his widow and administratrix of his estate. (R. 354) Under the Commission's Rules and Regulations (Section 1.323) and in accordance with its consistent practice, such involuntary transfers can be effectuated immediately. The obligation of the licensee or permittee is simply to notify the Commission promptly of the death and thereafter to file an application requesting consent for the involuntary transfer which had already taken place.

Intervenor will not attempt to go over the same ground which the Commission's brief covers. Intervenor in its brief simply desires to submit arguments on two points which it believes should be helpful to the Court.

STATUTES INVOLVED

The pertinent provisions of The Communications Act of 1934, as amended, are set forth in the Appendix hereto.

SUMMARY OF ARGUMENT

I.

Appellants have no standing to contest the extension of permit for construction of KNAC-TV. Appellant Southwestern Radio never was a party to the proceedings; and the interest of Southwestern Publishing, which was limited to the application for assignment of KNAC-TV, was rendered moot by the expiration of the contract for the assignment of that station. Further, questions presented with respect to the application for extension are not open for participation by third parties.

II.

Appellants' asserted standing with respect to the grant of the application for involuntary transfer of KNAC-TV to Mrs. Salome Nakdimen, administratrix of the estate of Hiram S. Nakdimen, deceased, fails to establish any injury flowing from the grant of that application. Insofar as the claim of injury is based upon the extension of permit, such claim has been disposed of in Point I, supra. No additional facts are alleged to show how Appellants would be aggrieved by the grant of the involuntary transfer. Further, Appellants have failed to exhaust their administrative remedies.

ARGUMENT

The appeal in this case is from two separate orders of the Commission, one granting an extension of time within which Intervenor can complete the construction of its station and the second, granting consent to the involuntary transfer of control of Intervenor. Appellants appear in this Court in a dual role and their claim for relief is based upon their dual role. The first aspect of their claim is based upon the fact that Southwestern Publishing -- but not Southwestern Radio -- was a party to the consolidated proceedings which led to a grant of Intervenor's extension application. Appellants urge that the Commission erred in ruling that the lapse of the assignment contract deprived Appellants of standing to raise issues concerning Intervenor in the proceedings on the extension application. The second aspect of Appellants' case is not too clearly articulated but appears to be based upon the claim that Appellants are persons aggrieved by a grant of Intervenor's applications and that the Commission could not legally grant such applications without passing upon the contentions raised in Appellants' pleadings. The thrust of this argument appears to be that even if the Commission were correct in ruling that Appellants lacked

standing in the proceedings theretofore conducted, they were entitled to raise their objections as persons aggrieved by the Commission's action. Each point will be discussed in turn.

I.

**APPELLANTS HAD NO STANDING IN THE
PROCEEDINGS ON THE EXTENSION
APPLICATION**

The proceedings before the Commission arose out of the fact that Intervenor entered into a contract with Appellant, Southwestern Publishing, to assign the construction permit for Channel 5 to the latter company, and the two companies filed an application with the Commission for consent to assign the permit. (R. 1-51) Intervenor also filed with the Commission an application for extension of time to complete construction of its television station, since Intervenor was not able to complete construction within the time specified in the construction permit. (R. 356-377)

Upon examination of both applications, the Commission was unable to conclude that public interest, convenience and necessity would be served by a grant of the applications. Accordingly, it sent a "McFarland letter" to the applicants pursuant to Section 309(b) of the Communications Act advising them of the problems which were involved. (R. 83) In reply to the Commission's letter Intervenor stated that in the event the Commission should not approve the assignment application it was prepared to proceed with construction. (R. 88-89) Southwestern Publishing agreed with and fully supported Intervenor's position. (R. 95) The replies filed by the applicants resolved the problems so far as the extension of construction permit was concerned, but did not satisfy the Commission on the issues involved in the assignment application. Accordingly, a hearing was ordered. (R. 96-96A)

Both applications were included in the hearing since the issue of trafficking in licenses which was the matter in controversy in the transfer hearing could, if determined adversely to the applicants, result in a determination not to extend the construction permit. The trafficking, if it were found to exist, related to the proposal to transfer the construction permit to Southwestern Publishing.

A hearing was held in which both applicants participated. The Examiner rendered a decision in which he found that there was no trafficking in licenses. Since this was the only issue in the case, the Examiner concluded that both applications should be granted. (R. 161-165A) No exceptions were filed either by Appellant or Intervenor to the Examiner's Decision.

The original contract between the parties had provided for an expiration date of February 1, 1955, (R. 30) but, by mutual consent, it was extended from time to time until April 1, 1956. (R. 352) When a final decision had not yet been rendered by the Commission by that date, Intervenor declined to extend the contract. (R. 302) As Appellants admit, this caused the contract to lapse by its own terms, and, as a result, the assignment application became moot. (App. Br. pp. 5-6, 20 f. n. 7) This left for the Commission's determination only the question whether the construction permit should be extended. The Commission had already determined that the objections it had raised to an extension of the construction permit were fully answered in the replies which the applicants had submitted in response to the Commission's McFarland letter. Of course, the question of possible trafficking in licenses which had a collateral bearing on the extension application still remained. As we have pointed out, the Examiner had resolved this issue in favor of Intervenor, and neither Appellant nor Intervenor excepted to the determination. However, before finally passing upon the extension application, the Commission considered the question and came to the same conclusion as did the Examiner. The Commission thereupon ordered that an extension of construction permit be granted. (R. 351-352A)

Appellants argue that this determination was erroneous because the Commission failed to pass upon certain allegations contained in various pleadings filed by Appellants in which they sought to reopen the record and to have a consolidated hearing on the extension application and the application for involuntary transfer of control. It is submitted that under the Communications Act, the Commission was correct in its determination that the petitions did not constitute a bar to favorable action upon Intervenor's application.

It should be remembered that only Southwestern Publishing -- and not Southwestern Radio ¹ -- was a party to the proceedings before the Commission and the reason Southwestern Publishing was a party to the proceedings before the Commission was solely because it was an applicant for assignment of permit to it and the Commission believed a hearing was necessary on this application. However, this proceeding became moot before the case was completed because the contract upon which the application was based expired. This left no assignment application for the Commission to consider. Indeed Appellants concede that the expiration of the contract caused the assignment application to lapse (App. Br. pp. 5-6, 20 f.n. 7) and neither before the Commission

¹ Southwestern Radio was not a party to the proceedings before the Commission on the application of Intervenor for extension of permit; nor was it a party to the application of Intervenor and Southwestern Publishing for assignment of KNAC-TV; nor did it seek to intervene in those proceedings; nor did it seek reconsideration of the Commission's action granting the extension of permit; nor, indeed, did it join with Southwestern Publishing in the initial petition filed by that company on April 10, 1956 (R. 287-300). Rather, Southwestern Radio limited itself to the statement appended to later pleadings filed by Southwestern Publishing that it "joins" in such pleadings. (R. 325-344). Since Southwestern Radio never was a party to the proceedings and since it did not seek reconsideration of the Commission's action it clearly follows that it had no right to participate in the proceedings relating to the extension of Intervenor's permit and that its appeal must be dismissed, pursuant to Section 405 of the Communications Act which provides in pertinent part:

"... The filing of a petition for rehearing shall not be a condition precedent to judicial review of any decision, order or requirement except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order or requirement. . . ."

nor in this Court have Appellants alleged that the Commission erred in dismissing the assignment application. The basis for Southwestern Publishing's participation in the proceedings having been eliminated, the Commission was fully justified in concluding that it was a stranger to the proceedings.

The soundness of the Commission's ruling can be illustrated by consideration of an analagous situation. Let us assume that an application for a standard broadcast station is designated for hearing because the Commission is not satisfied that the applicant possesses the necessary qualifications and also because of interference which the proposed station would cause to an existing station. The parties to such a hearing would be the applicant and the existing station. Under the Commission's Rules the existing station could participate in all aspects of the hearing and not simply the interference considerations. Let us further assume after the hearing commenced, applicant amended its application to specify a new frequency involving no interference to the existing station. The removal of the interference would certainly justify the Commission in ruling that the existing station had become a stranger to the proceedings, irrespective of any desire the existing station might have with respect to participating in the qualifications phase of the applicant's case.

It is submitted that Appellant's position in the existing situation is no different from that in the hypothetical case discussed above. Appellants urge, however, that there were two applications in these proceedings -- the assignment application and the extension application -- and that Southwestern Publishing was permitted to participate in the entire consolidated proceedings and was not limited to the assignment application. The point is made that even if the assignment application became moot, the extension application still remained.

The answer to this contention is twofold. In the first place, Southwestern Publishing was not a party to the extension application.

Moreover, Southwestern Publishing explicitly supported Intervenor's position that the application for extension should be granted in the event that the Commission should deny the application for assignment to Southwestern Publishing, (R. 95), and as a result of the replies to the "McFarland letter" no issue was raised in the proceedings concerning the extension application.

Secondly, it is clear that under the Communications Act third persons have no right to participate in proceedings affecting extension of construction permits. The Act provides ample opportunity for third persons to participate in proceedings involving applications for construction permit. Section 309 of the Communications Act makes detailed provision for competing applicants or other parties in interest to participate in the proceedings leading to the original grant of a construction permit. But once this occurs -- once a construction permit is finally granted -- an entirely different procedural system comes into play. Thereafter a construction permit remains valid and inevitably matures into a license unless the permit is automatically forfeited because the grantee fails to construct the station within the time allowed by the Commission or unless the Commission refuses to grant a license because new facts and circumstances coming to the Commission's attention since the granting of the construction permit would render operation of the station against the public interest.² But as we will show below, the determination in such cases is a matter between the Commission and the grantee and third persons such as Appellants have no right to participate in such proceedings.

Provisions governing extension of construction permit and issuance of license are found in Section 319 of the Communications Act.

² Of course, the Commission reserves the right under Section 312 of the Communications Act to revoke a construction permit because of false statements made by the applicant, for violation of the Communications Act or of the Commission's Rules and Regulations, and for similar reasons set forth in Section 312.

Section 319(b) provides that a construction permit shall be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow. The Commission has implemented the statutory provision in Sections 1.314(b) and 3.627 of the Rules and Regulations wherein it provides that extension of construction permit "will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of its grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension." Intervenor made such a showing (which was joined in and supported by Southwestern Publishing) which satisfied the Commission. And Appellants do not now contend that the showing was insufficient. The Commission was fully within its rights in granting the extension.

It is clear from the statute that application for extension of permits are addressed to the discretion of the Commission. Note the difference between Section 309 governing grant of permits and Section 319(b) relating to extension. The Commission under Section 309 may not grant a construction permit unless it finds that public interest, convenience and necessity will be served thereby. An elaborate procedure is set up in Section 309 to protect third persons desiring to object to a grant. Section 319(b), on the other hand, no longer requires a public interest finding nor is there any provision for third party participation. The Commission is given complete discretion in fixing starting and completion dates and in granting extension. Since the determination of whether or not to grant an extension is committed to the Commission's discretion, there is no basis upon which Appellants can base their claim to participate.

Appellants, however, seem to urge that the Commission should have held a hearing so that they could demonstrate to the Commission that the permit should be deleted in order that appellants could file an application therefor. The difficulty with this contention is that

even if Appellants already had an application on file for the channel in question, they would not be entitled to comparative consideration with the extension application. Bremer Broadcasting Corp.; 3 Pike & Fischer, R. R. 1579; United Detroit Theatres Corp. v. F. C. C., 85 U. S. App. D. C. 239, 178 F (2d) 700.

The United Detroit case is on all fours with the instant case. That case arose at a time when the Commission processed television applications on a city-by-city basis rather than on a channel-by-channel determination. Under the former system, all applications in a particular city were considered to be mutually exclusive -- irrespective of the particular channels requested -- if the number of applications for channels in that city exceeded the number assigned. In the United Detroit case there were originally three applicants for four channels.³ Two of the applicants were found to be fully qualified and were granted without a hearing. The third applicant was the appellant and as to it the Commission was not fully satisfied concerning its qualifications. Its application remained unacted upon. Meanwhile another application was filed and granted. This left one application, appellant's, and one channel. Before the Commission acted upon appellant's application, another application was filed which necessitated a hearing.

One of the original three applicants, WXYZ, Inc., was unable to complete the construction of its station within the time specified. It filed an application for extension which the Commission first designated for hearing but later granted. Appellant filed a petition against such grant and asked for comparative consideration of its application and that of WXYZ. The Commission denied the petition. The Court affirmed the Commission, saying:

³ Originally five channels were allocated to Detroit, but one was later deleted.

"The statute and the regulations permit construction not only within the six months but within any extended period granted by the Commission. The applications for extensions involved in the pending proceeding were seasonably made. The permits were, therefore, not cancelled but open for extension of the construction time."

Both the Commission's opinion in Bremer and the Court's opinion in United Detroit make it clear that a construction permit remains valid so long as construction is completed within the time specified in the original permit or within the period as extended by the Commission. Moreover, actual applicants or putative applicants -- such as Appellants in the instant case -- have no standing with respect to the Commission's determination to grant such an extension. The opinions in these two cases were rendered in 1947 and 1949 respectively. Section 319(b) was reenacted by Congress in 1952 without any substantial change. Hence, there is a strong presumption that Congress approved the interpretation of Section 319(b) which had previously been adopted.⁴

Appellants also argue in their brief (p. 23) that they are interested in the extension permit because they operate a UHF station which will have to compete with Intervenor's VHF station. However, the injury, if any, flows either from the grant of the original construction permit or from operation of the station resulting from subsequent licensing of the station. As to the former, Appellants never objected to the original grant: On the contrary, Southwestern Publishing joined Intervenor in its request for an extension of permit. As to the latter, Section 319(c) explicitly provides that a license must be issued if construction has been completed within the time allowed by the Commission unless new facts or circumstances coming to the attention of the Commission since the grant of the permit show that operation

⁴ Morgan v. Commissioner of Internal Revenue, 309 U.S. 78, 81 (1940); Helvering v. Reynolds Tobacco Co., 306 U.S. 110, 114-115 (1939); Hartley v. Commissioner of Internal Revenue, 295 U.S. 216, 220 (1935); Sutherland Statutory Construction, (1943 ed.) Vol. II, Sec. 5109.

would be against the public interest. Moreover, Section 319(c) specifically provides that Section 309(a) (b) and (c) shall not apply to such proceedings. Section 309 contains the only provisions relating to third party participation in proceedings upon applications.⁵

There is no theory upon which Appellants can predicate their right to participate in the proceedings relating to the extension of Intervenor's permit. The scheme of the Act is clear that persons who desire to compete for facilities or who desire to object to a grant of facilities must do so either before the original construction permit is granted or when an application is filed for a renewal of license. In between the proceedings affect only the grantee and the Commission, and third persons such as Appellants have no standing with respect thereto.

II.

THE COMMISSION DID NOT ERR IN REFUSING TO INITIATE A NEW PROCEEDING ON APPELLANTS' PLEADINGS.

As has already been pointed out, Appellants not only sought to reopen the hearing before the Commission but also asked that the application for involuntary transfer of control be consolidated with the hearing on the application for assignment of KNAC-TV to Southwestern Publishing. The involuntary transfer application had not been designated for hearing and, thus, in effect, Appellants were seeking as an original matter to have that application designated for hearing and to have it consolidated for hearing with the extension application.

Appellants' pleadings in this respect are notably deficient. There is no effort whatsoever to show how Appellants are in any way aggrieved by a grant of the involuntary transfer. And in the nature of things it is

⁵ The Commission has specifically ruled that a Section 309(c) protest does not lie against a grant of an application for extension of permit. Channel 16 of Rhode Island, Inc., 10 Pike & Fischer, R.R. 377; Tri-State Television, Inc., 10 Pike & Fischer R.R. 1049.

difficult to see how Appellants can in any way be affected by substituting an administratrix for her deceased husband. It is clear from reading Appellants' pleadings that the only action against which they complain relates to the extension of permit. As they point out in their brief (p. 23) their interest lies in the fact that if the permit is extended, Appellants' station will have competition in Fort Smith, and, conversely, if the permit is not extended Appellants will have an opportunity to apply for intervenor's VHF channel in lieu of its UHF channel. But as we have already demonstrated under Point I, Appellants have no standing to participate in proceedings relating to the deletion of a construction permit. Once a permit has been issued, Appellants like anyone else must wait until the Commission deletes the permit -- and the statute makes it clear that the decision whether to delete a permit or not is a matter between the Commission and the applicant alone. Third persons have no standing in such proceedings.

In the second place, assuming standing, Appellants have failed to exhaust their administrative remedies so far as the involuntary transfer application is concerned. This application was granted without a hearing. Pursuant to the provisions of Section 309(c) of the Communications Act, this grant was subject to protest by a person in interest if a proper showing of standing and sufficient grounds are shown. Upon the filing of an appropriate protest, the Commission would be required to afford Appellants a hearing. They have never filed any such protest. Where Congress has provided a specific statutory method for obtaining relief, the courts will refuse to entertain a suit on the part of persons who have chosen not to avail themselves of the administrative remedy.⁶

Appellants might argue that they did exhaust their administrative remedies by virtue of the pleadings they did file with the Commission.

⁶ Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767-768 (1947); Allen v. Grand Central Aircraft Co., 347 U.S. 535, 553 (1954); Robeson v. Dulles, ___ U.S. App. D.C. ___, 235 F. 2d 810 (1956).

However, these pleadings did not invoke the specific administrative remedy which the statute has provided in this type of situation. The pleadings filed by Appellants are not provided for either by the statute or the Commission's Rules and Regulations. Moreover, they were not under oath -- a specific statutory requirement for protests against grants without hearing. The pleadings were, therefore, directed to the Commission's discretion. Protests, on the other hand, are not within the Commission's discretion. If they meet the statutory standard, the Commission must grant them. And the Commission has demonstrated that it will grant protests in cases where it previously denied petitions to designate for hearing filed before the Commission acted on the application.

Thus, for example, petitions requesting the designation for hearing of applications for the assignment of WBUF-TV, Buffalo, New York (BAPCT 150) and WGTH-TV, Hartford, Connecticut (BAPCT 159) were denied by the Commission and the said applications were granted. (Commission letters dated September 21, 1956 (FCC-55-949) and February 23, 1956 (FCC 56-160)). Thereafter, upon consideration of protests which met the requirements of Section 309(c) of the Communications Act the Commission granted the said protests and designated the applications for hearing in accordance with the mandatory provisions of that section. (WBUF-TV, Inc., 13 Pike & Fischer R. R. 60; General Times Television Corp., 13 Pike & Fischer R. R. 1049) Appellants have made no effort to utilize a full and adequate administrative remedy the statute has made available to them. Their appeal must, therefore, fail.

CONCLUSION

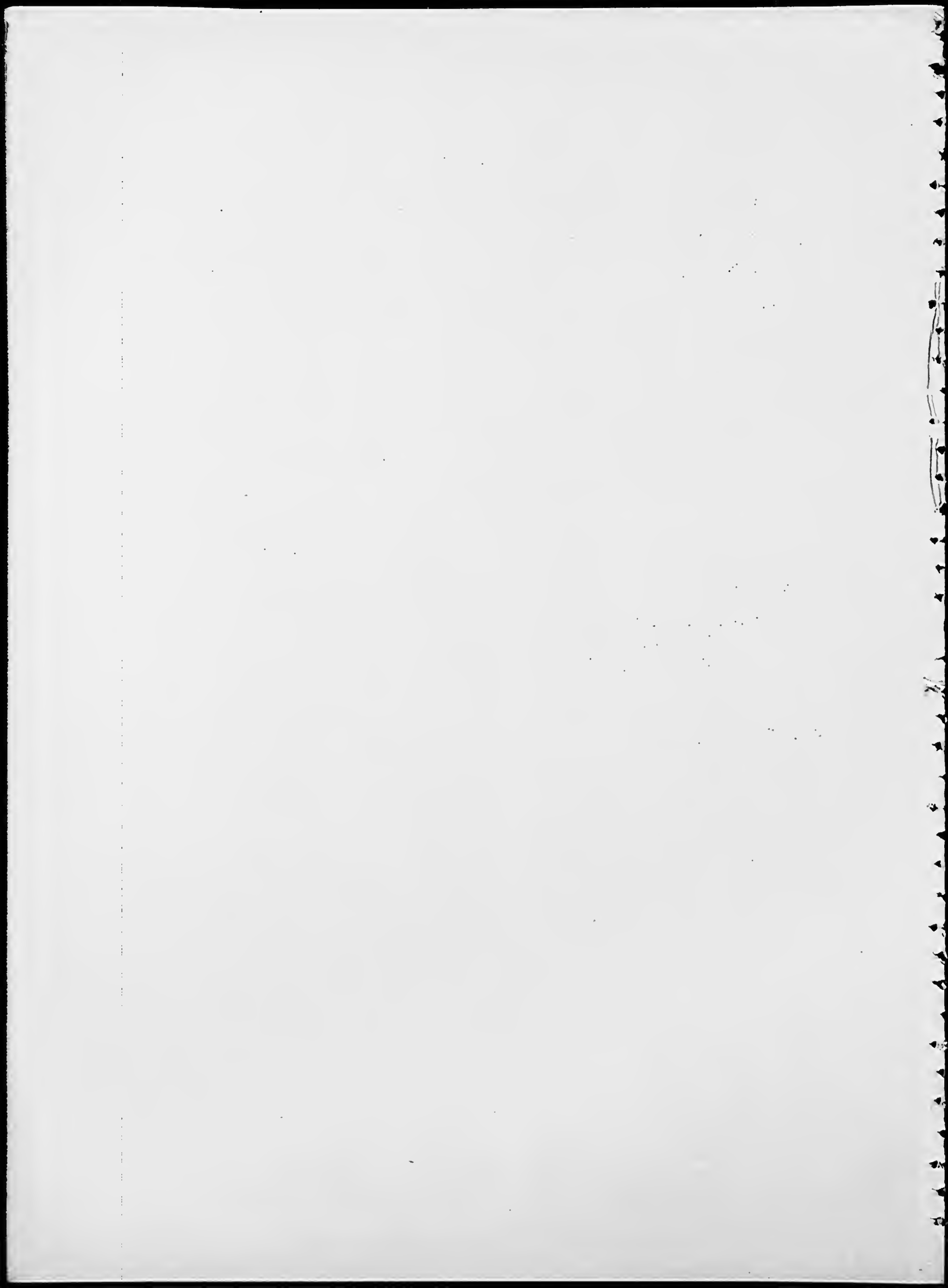
In the light of the foregoing, it is respectfully submitted that Appellants have no standing to contest the extension of permit of KNAC-TV or the involuntary transfer of that station and that the decisions and orders of the Commission under review herein should be affirmed.

Respectfully submitted,
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APPENDIX

The Communications Act of 1934, as amended, 47 U.S.C. 1 et seq. provides in pertinent part as follows:

Section 309. (a) If upon examination of any application provided for in Section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with

the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. * * *

* * * * *

Section 319. (a) No license shall be issued under the authority of this Act for the operation of any station, the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the

citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

(c) Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of Section 309(a), (b) and (c) shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.